Supreme Court, U. S.
FILED
AUG 5 1974
MICHAEL RODAK, JR., CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1974

74-75

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

ELIZABETH JANE HALL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

STUART A. SMITH,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ELIZABETH JANE HALL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America and the District Director of Internal Revenue for the District of Kentucky, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion and order of the district court (Appendix A, *infra*, pp. 1a-6a) are not reported. The opinion of the court of appeals (Appendix B, *infra*, pp. 7a-10a) is reported at 493 F.2d 1211.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1974 (Appendix C, *infra*, pp. 11a-12a). By order dated May 31, 1974, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including August 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Anti-Injunction Act (Section 7421(a) of the Internal Revenue Code of 1954) bars a suit by any person to restrain the assessment or collection of any tax. The provision contains an exception for cases where the Commissioner is required to issue a notice of deficiency under Section 6212(a).

The question presented is whether the Commissioner may terminate a taxpayer's taxable year under Section 6851 of the Code and assess the taxes due for the terminated period without issuing a notice of deficiency under Section 6212(a), so that a suit to enjoin the Commissioner's assessment and collection of taxes would be barred under the Anti-Injunction Act.

STATUTES INVOLVED

The pertinent provisions of Sections 6201, 6211, 6212, 6213, 6331, 6332, 6335, 6511, 6532, 6851, 6861, 6863, 7421, and 7422 of the Internal Revenue Code of 1954 are set forth at Appendix D, *infra*, pp. 13a-28a.

STATEMENT

On February 1, 1973, the District Director of Internal Revenue for the District of Kentucky notified respondent by letter that he found her to be involved in illicit drug activities tending to prejudice or render ineffectual the collection of income tax for the period January 1, 1973 through January 30, 1973. Pursuant to his authority under Section 6851 of the Internal Revenue Code of 1954, he declared her taxable period commencing January 1, 1973, to be terminated as of January 31, 1973, and the income tax for that period to be immediately due and payable. He further stated that the amount of tax owed for the terminated period was $52,680.25, and would be assessed immediately (Appendix A, *infra*, p. 1a; Appendix B, *infra*, p. 8a).

Respondent was unable to pay the tax. Pursuant to its authority under Section 6331 of the Code, the Internal Revenue Service thereupon levied on all of her property, which included her automobile and her bank account. The bank paid the balance of the account over to the Internal Revenue Service which proceeded to receive bids on respondent's automobile (Appendix A, *infra*, p. 1a; Appendix B, *infra*, p. 8a).

On February 13, 1973, respondent filed a complaint in the United States District Court for the Western District of Kentucky seeking injunctive relief with respect to the assessment against her. The district court granted a preliminary injunction re-

quiring the immediate return of respondent's automobile upon her posting of a bond sufficient to cover its fair market value. The court further barred the Internal Revenue Service from "seizing or levying upon any of her property of whatever nature * * *" (Appendix A, *infra*, pp. 5a-6a). In the district court's view, when the Internal Revenue Service terminates a taxpayer's taxable year under Section 6851 and assesses taxes for the terminated period, it must issue a notice of deficiency under Section 6212(a). Because the Internal Revenue Service did not issue such a notice of deficiency to respondent, the district court held that the bar of the Anti-Injunction Act (Section 7421(a) of the Code) against suits to restrain the assessment and collection of taxes was not applicable (Appendix A, *infra*, pp. 1a-4a).

The court of appeals affirmed (Appendix B, *infra*, pp. 7a-10a). Invoking its earlier decision in *Rambo* v. *United States*, 492 F.2d 1060 (C.A. 6), petition for a writ of certiorari pending, No. 73-2005, the court of appeals concluded that "*Rambo* is decisive of all the legal questions involved in our case and we will follow it" (Appendix B, *infra*, p. 9a).

REASONS FOR GRANTING THE WRIT

This case presents the identical issue as *United States* v. *Rambo*, 492 F.2d 1060 (C.A. 6), petition for a writ of certiorari pending, No. 73-2005; and *Laing* v. *United States*, 364 F.Supp. 469 (D. Vt.),

affirmed, May 2, 1974 (C.A. 2), petition for a writ of certiorari pending, No. 73-1808.[1]

1. The court of appeals, relying upon its prior decision in *United States* v. *Rambo*, *supra*, affirmed the district court's issuance of an injunction against the Internal Revenue Service's collection efforts pursuant to an assessment issued against respondent. In so holding, the decision below is in direct conflict with *Irving* v. *Gray*, 479 F.2d 20 (C.A. 2), and *Laing* v. *United States*, *supra*. In those two cases, the Second Circuit has held that a similar action to enjoin the seizure of property by the Internal Revenue Service pursuant to its termination of a taxpayer's taxable year under Section 6851 of the Code is barred by Section 7421(a), commonly referred to as the Anti-Injunction Act.[2] That Act prohibits a "suit for the purpose of restraining the assessment or collection of any tax * * * in any court by any person * * *." The decision also conflicts with that of the Seventh Circuit in *Williamson* v. *United States*, 31 A.F.T.R. 2d 73-800 (unreported order of April 8, 1971), which also concluded, in the context of a suit for refund of taxes collected pursuant to a Section 6851 termination of a taxable year, that such

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[1] The government has acquiesced in the granting of the petition in *Laing*.

[2] Last Term, this Court upheld the bar of the Anti-Injunction Act in two cases involving attempts to obtain equitable relief in connection with tax-exempt status. See *Bob Jones University* v. *Simon*, No. 72-1470, and *Alexander* v. *"Americans United", Inc.*, No. 72-1371, both decided May 15, 1974.

a termination does not require the issuance of a notice of deficiency. Resolution of the conflict by this Court is important to the administration of the federal tax laws.[3]

2. For the reasons stated in our petition for a writ of certiorari in *Rambo*, a copy of which we are furnishing to respondent's counsel, the decision below rests upon the erroneous initial premise that the Commissioner is required to issue a notice of deficiency under Section 6212(a) to a taxpayer whose taxable year is terminated under Section 6851. Thus, his failure to do so does not trigger the application of the prefatory exception phrase of the Anti-Injunction Act—"Except as otherwise provided in Sections 6212(a) and (c), [and] 6213(a) * * *." The court below accordingly erred in holding that the district court had jurisdiction to enjoin the Internal Revenue Service's collection efforts.

[3] At present there are more than 70 cases pending in the federal courts involving this question and it is expected that the number of cases will continue to increase. We have been advised by the Internal Revenue Service that for the fiscal year 1972, it terminated the taxable years of more than 600 taxpayers and correspondingly assessed taxes in excess of $30 million. For the fiscal year 1973, more than 1800 taxable years were terminated with assessments in excess of $60 million.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending this Court's ultimate disposition of the *Rambo* and *Laing* cases.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

STUART A. SMITH,
Assistant to the Solicitor General.

AUGUST 1974.

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7571-G

ELIZABETH JANE HALL

vs.

UNITED STATES OF AMERICA, THOMAS P. McHUGH, ELMER SNYDER and DONALD POWERS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

[Entered March 9, 1973]

This action came before this Court on plaintiff's motion for a preliminary injunction. Following a seizure by state police of alleged dangerous drugs on her premises, Internal Revenue Service agents assessed plaintiff with a tax bill of $52,680.25. When she said she was unable to pay, the Internal Revenue Service attached all of her property, including her bank account and her car. The Internal Revenue Service then sent plaintiff a certified letter stating that they would soon sell the car, pursuant to the authority vested in them by Section 6851 of the Internal Revenue Code.

In deciding to issue a preliminary injunction, this Court relies on *Schreck* v. *United States*, 301 F.

Supp. 1265 (D.C. Md. 1969), and *Rambo* v. *United States*, (C.A. No. 7370-A, U.S. Dist. Court for the Western Dist. of Ky. at Louisville).

The Court in the *Schreck* case ruled that the proper construction of 26 U.S.C. §§ 6851, 6861 and 6213(a) requires that the government send a deficiency notice to the taxpayer respecting the shortened tax year and that the government's failure to do so entitles the taxpayer to obtain injunctive relief in the district court pursuant to Section 6218(a). This interpretation was adopted by Judge Allen, in *Rambo* (supra), who agreed with Judge Kaufman's opinion in *Schreck* "that 26 U.S.C. § 6851 contained no assessment provisions within its bounds", and that in a Section 6851 short year case, the taxpayer is entitled to the protections afforded by Section 6861. Those provisions, as set out in *Rambo* are as follows:

1. The IRS is required to send a deficiency notice within 60 days after the assessment, thus enabling the jeopardy taxpayer to litigate in the Tax Court. Section 6861(b). If the IRS does not comply with this requirement, the assessment and levy or seizure may be enjoined by the federal courts. Section 6213(a), *United States* v. *Ball*, 326 F. 2d 898 (4th Cir., 1964).
2. The jeopardy taxpayer can stay all collection action pending the Tax Court's decision if he is able to post an adequate bond. Section 6863 (a).

3. The property seized pursuant to the assessment may not, in general, be sold during the pendency of the litigation in the Tax Court. Section 6863(b) (3) A.
4. IRS may abate the jeopardy assessment if it finds that jeopardy does not exist. Section 6861(g).

But, these safeguards may not afford any substantial protection to the taxpayer, where, as in the instant case, the assessment was far in excess of plaintiff's assets. Where the property of taxpayer was subjected to a federal tax lien, as here, the right to file a bond is without meaning to plaintiff and cannot be accomplished. And unless the value of the seized property is as great as the assessment, the taxpayer is barred from filing a refund suit in the district court under the full-payment rule of *Flora* v. *United States*, 362 U.S. 145 (1960). The value of plaintiff's property was not as great as the assessment in this case, and therefore, she was precluded from filing a refund suit. She has, in fact, been denied any remedy at all.

And finally, as pointed out in *Schreck* at page 1281, "if the Court were to hold that IRS has the right to seize and sell all of a person's property with no corresponding right to the taxpayer to institute any court proceeding, for perhaps longer than three years, in which to litigate the validity of the underlying assessment and seizure, while all jeopardy income taxpayers other than short-year jeopardy in-

come taxpayers have the right to begin a judicial proceeding within sixty days of the assessment, it would raise serious constitutional questions of equal protection and due process."

The Court orders that plaintiff's car be returned to her possession upon her posting a bond in the amount of its fair market value. It is ordered that a preliminary injunction be issued. This preliminary injunction is a final and appealable order. This order extends only to enjoining defendants from harassing or intimidating plaintiff or from levying upon or selling any of her property prior to a resolution of the legal issues involved by the 6th Circuit Court of Appeals. All other issues raised by the pleadings are reserved for later rulings by this court.

March 9th, 1973

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7571-G

ELIZABETH JANE HALL
vs.
UNITED STATES OF AMERICA, THOMAS P. MCHUGH, ELMER SNYDER and DONALD POWERS

[Entered March 9, 1973]

PRELIMINARY INJUNCTION

The Court, having entered its findings of fact, conclusion of law and opinion, and being fully advised in the premises,

IT IS HEREBY ORDERED that defendants United States of America, Thomas P. McHugh, Elmer Snyder, Donald Powers, their agents, servants, employees and attorneys, and all persons in active concert and participation with them, be and they hereby are enjoined from in any manner, either directly or indirectly, selling plaintiff's automobile or any of her property and from harassing or intimidating plaintiff in any manner including but not limited to trespassing on, seizing or levying upon any of her property of whatever nature, be it rental property or not.

IT IS HEREBY ORDERED that defendants United States of America and Thomas P. McHugh,

Acting District Director of Internal Revenue for the District of Kentucky, their agents, servants, employees and all others acting in concert with them or on their behalf return to the plaintiff Elizabeth Jane Hall, her 1970 Volkswagon automobile, Identification Number 360 207 2167, Model Number 3611, Body Style 25, bearing current Jefferson County Kentucky license plate numbered J19-797 upon posting by the plaintiff a bond sufficient to cover the fair market value of the automobile.

It is further expressed that it is not the intention of the Court by this Preliminary Injunction to in any way restrict Lt. Donald Powers of the Kentucky State Police in the lawful performance of his duties as a law enforcement officer, except as to the matters specifically dealt with in the two preceding paragraphs.

IT IS HEREBY ORDERED that this Preliminary Injunction take effect immediately. This Preliminary Injunction is a final and appealable order.

March 7, 1973.

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73-1614

ELIZABETH JANE HALL, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, THOMAS P. MCHUGH and ELMER SNYDER, DEFENDANTS-APPELLANTS

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Decided and Filed March 12, 1974

Before WEICK, EDWARDS and LIVELY, Circuit Judges

PER CURIAM. This appeal is from a preliminary injunction granted by the District Court, restraining the sale of taxpayer's automobile and the collection of a jeopardy assessment made without any notice of deficiency, which assessment is alleged to be invalid because it compelled taxpayer to pay the tax without affording her a remedy in the Tax Court to determine its validity.

The Director of Internal Revenue Service wrote to the taxpayer on February 1, 1973, stating that he found her involved in illicit drug activities tending to prejudice or render ineffectual the collection of income tax for the period January 1, 1973 through January 30, 1973. Accordingly, under the authority of Section 6851 of the Internal Revenue Code, he declared her taxable period commencing January 1, 1973, terminated as of January 31, 1973, and the income tax for such period to be immediately due and payable. He further stated that the tax for said period in the amount of $52,680.25, would be assessed immediately and he made demand for the payment thereof.

The fact is that the tax was assessed on February 1, 1973. The Director did not furnish to taxpayer any documents or papers to indicate how or in what manner the tax was computed.

Except for such short-term termination, taxpayer's income tax return would not have been required to be filed until April 15, 1974.

Taxpayer was unable to pay the tax and Internal Revenue Service then levied on all of her property, which included her Volkswagen automobile and her bank account. The bank paid the money out of the account to Internal Revenue Service. Internal Revenue Service proceeded to take bids on taxpayer's automobile.

Taxpayer then instituted the present action in the District Court, which granted a temporary restrain-

ing order and then a preliminary injunction, from which the Service has appealed.

In granting the injunction the Distirct Court relied on *Rambo* v. *United States*, 353 F.Supp. 1021 (W.D.Ky. 1972) and *Schreck* v. *United States*, 301 F.Supp. 1265 (D.Md. 1969).

The facts in *Rambo* are similar to the facts in the case at bar. This Court has since affirmed *Rambo*. *Rambo* v. *United States*, —— F.2d —— (6th Cir. Nos. 73-1131, 73-1413, 1974). *Rambo* is decisive of all the legal questions involved in our case and we will follow it.

In the opinion in *Rambo*, written for the Court by Circuit Judge William E. Miller, it was pointed out that normally the taxpayer would have no recourse to restrain the collection of an invalid tax because of the provisions of Section 7421(a). Taxpayer's only remedy would be to pay the tax, file her return, and then sue for a refund.

We rejected the contention of I.R.S. that the assessment was made under Section 6201 because the authority for assessing such a tax was derived from the provisions of Section 6861, not 6201. Section 6861 provides for the assessment of a deficiency and demand for payment. A deficiency notice to taxpayer must be given within sixty days after the assessment. No such notice was ever given to taxpayer. Had such determination been made and the deficiency notice given, taxpayer could have resorted to the Tax Court for determination of the validity of the tax.

It is very important to a taxpayer, particularly to one who does not have $52,000, that she have a right to litigate the validity of the tax before her property is levied upon and sold to pay the tax. The Tax Court of the United States was established for the very purpose of providing such a remedy for taxpayers. Because of the failure of I.R.S. to determine a deficiency and to give sixty days' notice to taxpayer, as the law required, I.R.S. has prevented plaintiff from availing herself of the remedy in the Tax Court. Her only remedy, therefore, was to file the injunction suit in the District Court.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed Mar. 12, 1974, James A. Higgins, Clerk]

[Filed Apr. 5, 1974, U. S. District Court, Western Dist. Kentucky, August Winkenhofer, Jr., Clerk]

No. 73-1614

ELIZABETH JANE HALL, PLAINTIFF-APPELLEE

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Before: WEICK, EDWARDS and LIVELY, Circuit Judges

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF
THE COURT

/s/ James A. Higgins
Clerk

A True Copy.
Attest:

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

Issued as Mandate: April 2, 1974

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6201. ASSESSMENT AUTHORITY.

(a) Authority of Secretary or Delegate.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing and under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) Taxes shown on return.—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

(2) Unpaid taxes payable by stamp.—

(A) Omitted stamps.—Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary or his delegate, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor

upon the person or persons the Secretary or his delegate determines to be liable for such tax.

(B) Check or money order not duly paid. —In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) Erroneous income tax prepayment credits.—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(b) [as amended by Sec. 2(b), Act of August 7, 1969, P.L. 91-53, 83 Stat. 91] Amount Not To Be Assessed.—

(1) Estimated income tax.—No unpaid amount of estimated tax under section 6153 or 6154 shall be assessed.

• • • •

(d) [as amended by Sec. 101(j)(38), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] Deficiency Proceedings.—

For special rules applicable to deficiencies of income, estate, gift, and chapter 42 taxes, see subchapter B.

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) [as amended by Sec. 101(f), Tax Reform Act of 1969, *supra*] In General.—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

• • • •

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, and Sec. 101(j)(40), Tax Reform Act of 1969, *supra*] In General.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42, he is au-

thorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

* * * *

(c) Further Deficiency Letters Restricted.—

(1) [as amended by Sec. 101(f), Tax Reform Act of 1969, *supra*, and Sec. 102(d), Excise, Estate and Gift Tax Adjustment Act of 1970, P.L. 91-614, 84 Stat. 1836] General rule.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments).

* * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, *supra*] Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150

days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * *

§ 6331. Levy and distraint.

(a) Authority of Secretary or delegate.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to

property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.

The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible). • • •

§ 6332. Surrender of property subject to levy.

(a) Requirement.

Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to

levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process. • • •

§ 6335. Sale of seized property.

(a) Notice of seizure.

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.

The Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or

if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331 (a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

* * * *

§ 6511. Limitations on credit or refund.

(a) Period of limitation on filing claim.

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

* * * *

§ 6532. Periods of limitation on suits.

(a) Suits by taxpayers for refund.

(1) General rule.

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

* * * *

SEC. 6851. TERMINATION OF TAXABLE YEAR.

(a) Income Tax in Jeopardy.—

(1) In general.—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment

of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

* * * *

(b) Reopening of Taxable Period.—Notwithstanding the termination of the taxable period of the taxpayer by the Secretary or his delegate, as provided in subsection (a), the Secretary or his delegate may reopen such taxable period each time the taxpayer is found by the Secretary or his delegate to have received income, within the current taxable year, since a termination of the period under subsection (a). A taxable period so terminated by the Secretary or his delegate may be reopened by the taxpayer (other than a nonresident alien) if he files with the Secretary or his delegate a true and accurate return of the items of gross income and of the deductions and credits allowed under this title for such taxable period, together with such other information as the Secretary or his delegate may by regulations prescribe. If the taxpayer is a nonresident alien the

taxable period so terminated may be reopened by him if he files, or causes to be filed, with the Secretary or his delegate a true and accurate return of his total income derived from all sources within the United States, in the manner prescribed in this title.

* * * *

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) Authority for Making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) Deficiency Letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

* * * *

(g) Abatement if jeopardy does not exist.

The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a

decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

§ 6863. Stay of collection of jeopardy assessments.

(a) Bond to stay collection.

When a jeopardy assessment has been made under section 6861 or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary or his delegate, within such time as may be fixed by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with the interest thereon) the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by

the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of the jeopardy assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced.

(b) Further conditions in case of income, estate, or gift taxes.

In the case of taxes subject to the jurisdiction of the Tax Court—

(1) Prior to petition to Tax Court.

If the bond is given before the taxpayer has filed his petition under section 6213(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such section, then the amount, the collection of which is stayed by the bond, will be paid on notice and demand at any time after the expiration of such period, together with interest thereon from the date of the jeopardy notice and demand to the date of notice and demand under this paragraph.

(2) Effect of Tax Court decision.

The bond shall be conditioned upon the payment of so much of such assessment (collection of which is stayed by the bond) as is not abated by a decision of the Tax Court which has become final. If the Tax Court determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Tax Court is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(3) Stay of sale of seized property pending Tax Court decision.

(A) General rule.

Where, notwithstanding the provisions of section 6213(a), a jeopardy assessment has been made under section 6861 the property seized for the collection of the tax shall not be sold—

(i) if section 6861(b) is applicable, prior to the issuance of the notice of deficiency and the expiration of the time provided in section 6213(a) for filing petition with the Tax Court, and

(ii) if petition is filed with the Tax Court (whether before or after the making of such jeopardy assessment under section 6861), prior to the expiration of the period during which the assessment of the deficiency would be prohibited if section 6861(a) were not applicable.

(B) Exceptions.

Such property may be sold if—

(i) the taxpayer consents to the sale,

(ii) the Secretary or his delegate determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or

(iii) the property is of the type described in section 6336.

(C) Applicability.

Subparagraphs (A) and (B) shall be applicable only with respect to a jeopardy assessment made on or after January 1, 1955, and shall apply with respect to taxes imposed by this title and with respect to taxes imposed by the Internal Revenue Code of 1939.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * *

§ 7422. Civil actions for refund.

(a) No suit prior to filing claim for refund.

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the

regulations of the Secretary or his delegate established in pursuance thereof.

* * * *

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Supreme Court, U. S.
FILED
NOV 27 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-75

UNITED STATES OF AMERICA, ET AL.,
Petitioners

—v.—

ELIZABETH JANE HALL

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 5, 1974
CERTIORARI GRANTED, OCTOBER 15, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-75

UNITED STATES OF AMERICA, ET AL.,
Petitioners

—v.—

ELIZABETH JANE HALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[1] The findings of fact, conclusions of law, opinion, and preliminary injunction of the district court are set forth at Pet. App. A 1a-6a. The opinion and judgment of the court of appeals are set forth respectively at Pet. App. B 7a-10a and Pet. App. C 11a-12a.

RELEVANT DOCKET ENTRIES

1973		
June	20	*Certified record* (1 vol. of pleadings and transcript), filed; and cause docketed
"	22	Appearance of counsel for Appellee
July	2	Appellant's statement of issues presented and designation of record for appendix
"	12	Appearance of counsel for Appellant
"	30	Appearance of counsel for Appellants
"	30	Twenty-five copies of Brief for Appellants
"	30	Ten copies of Appendix
Aug.	13	Motion: Appellee's brief for 45 days (Granted, 8/22/73)
Oct.	5	Twenty-five copies of Brief for Appellee, with proof of service
"	23	Twenty-five copies of Reply Brief for Appellants, with proof, of service
Dec.	11	Cause argued and submitted (Before: Weick, Edwards and Lively, JJ.) BB-2
1974		
Mar.	12	Judgment of the District Court affirmed CC-4
"	12	Opinion Per Curiam (Weick, Edwards, Lively, JJ.)
Apr.	2	Mandate issued (No costs taxed) Opinion with mandate
June	5	Copy of letter from Supreme Court advising that on 5/31/74 extension of time to file petition for certiorari was granted to 8/9/74
Aug.	8	Notice of filing petition for certiorari on 8/5/74 (Sup. Ct. 74-75)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action 7571-G

[Filed February 13, 1973]

ELIZABETH JANE HALL
Route 5, Box 98
Shelbyville, Kentucky 40065
PLAINTIFF

vs.

UNITED STATES OF AMERICA,
THOMAS P. MCHUGH,
Acting District Director of Internal
Revenue for the District of Kentucky,

ELMER SNYDER,
Group Supervisor of Internal Revenue
for the District of Kentucky, and

DONALD POWERS
Route 4
Lawrenceburg, Kentucky
DEFENDANTS

COMPLAINT

1. Plaintiff is a citizen and resident of the United States and of Shelby County, Kentucky. Individually named Defendants are sued individually and in their official capacities.

2. This is an action for damages and to enjoin the Defendants from continuing in force and effect a purported assessment and levies against the property of the Plaintiff allegedly to be applied to federal income taxes due or to become due in respect of any period falling within the calendar year 1973, and for mandatory injunction ordering the return to Plaintiff of her property, including money, heretofore seized pursuant to such levies.

Jurisdiction is founded upon 28 USC Section 1340, Section 6213(a) of the Internal Revenue Code of 1954, and 28 USC 1361, all as supplemented by the following provisions of the Administrative Procedure Act: 5 USC, Sections 702, 703, 704 and 706; 28 USC Sections 1331 and 1343; 42 USC Section 1983. The action arises under the Constitution and laws of the United States. The amount in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

3. Plaintiff, an individual, jointly with her husband, Sterling Hall, filed her Federal income tax returns for the years 1969, 1970 and 1971 and for previous years on a calendar year basis, and the calendar year constitutes the correct taxable year for the Plaintiff under Internal Revenue Code Section 441 for the purpose of any and all federal income tax liabilities in respect to any period within the calendar year 1972 and 1973.

4. On or about February 1, 1973, Plaintiff received from the Defendant, Thomas P. McHugh, Acting District Director of the Internal Revenue Service for the District of Kentucky, a letter dated February 1, 1973, a true copy of which is attached hereto as Exhibit A. Said letter purported to terminate Plaintiff's taxable year beginning January 1, 1973 on February 1, 1973, the date of said letter. On or about February 1, 1973, the Defendants purported to assess federal income tax for the period January 1, 1973 through January 30, 1973 against Plaintiff in amount of $52,680.25, as set forth in Exhibit B attached hereto and made a part hereof.

5. Notwithstanding language to the contrary contained in Exhibit B, Plaintiff has not filed a federal income tax return for the period January 1, 1973 through January 30, 1973 and by reason of Section 6072 of the Internal Revenue Code, no return has been due to be filed by Plaintiff. If any income tax return for said period has been filed, on behalf of or in respect of Plaintiff by any person, such return has been illegally and unlawfully filed and is without force or effect.

6. Purportedly acting under authority of Section 6851 of the Internal Revenue Code, and the determination set forth in Exhibit A and the purported assessment set

forth in Exhibit B, Defendants on or about February 1, 1973 levied upon and seized the following property of Plaintiff:

One 1970 Volkswagon Squareback was seized. The certificate of registration is attached as Exhibit C.

Agents of the Defendants further informed Plaintiff that they had a levy on all of her property and that she could not move any of her personal property across the Shelby County line, including furniture, personal effects, and clothing, items specifically exempted, in part, from Levy under Section 6334 of the Internal Revenue Code of 1954.

On or about February 9, 1973, C. A. Smith, an agent of Defendants, further informed Plaintiff by telephone that Defendants intended to sell her car within one week; that she could buy it herself but that it would probably be retaken by Defendants. Agent Smith further informed Plaintiff that Defendants would be coming to get her furniture and other personal property later in the month.

The above property constitutes virtually the entire estate of Plaintiff. The levy is appended as Exhibit D.

7. Defendants have not, to date of this complaint, mailed to Plaintiff the notice of deficiency described in Internal Revenue Code Section 6212, which notice of deficiency for the period January 1, 1973 through January 30, 1973 is required to be mailed to Plaintiff by reason of Internal Revenue Code Section 6861(b) within sixty days after making of such assessment, for which failure injunctive relief lies under Internal Revenue Code Section 6213.

8. Defendants' failure to send by registered or certified mail (or by any other means) to Plaintiff within sixty days after February 1, 1973 or before or after said assessment or at any time whatever, a statutory notice of deficiency, as they were required to do by Section 6861(b) of the Internal Revenue Code, constituted a deprivation of Plaintiff's property without due process of law, against which injunctive relief lies by reason of Internal Revenue Code Section 6213(a) and otherwise. Defendants have in fact announced an intention to unlawfully sell Plaintiff's property prior to the expiration of the statutory sixty days.

9. Defendants' failure to send Plaintiff a statutory notice of Deficiency deprived Plaintiff of the right to contest Defendants' purported assessment in the United States Tax Court, as such notice is a jurisdictional prerequisite in such Court, the deprivation of which right violated the due process clause of the Fifth Amendment of the Constitution of the United States. Plaintiff further states that the threat of an imminent sale of said property is in violation of Section 6335 of the Internal Revenue Code in that the requisite statutory notice of sale has not been given.

10. Defendants' determination to terminate Plaintiff's taxable year and the levy on and seizure of Plaintiff's property and the failure to send statutory notice of deficiency as herein set forth, was arbitrary, capricious, an abuse of discretion, in excess of statutory authority and contrary to Plaintiff's statutory and constitutional rights to due process of law, for all of which Defendants' acts and omissions review may be had, under 5 USC 706.

11. Alternatively, Plaintiff states that if the Defendants were *not* required to send a statutory notice of deficiency to Plaintiff within sixty days after February 1, 1973 or before attempting to sell said property prior to the expiration of sixty days, and if Defendants' acts and omissions with regard to Plaintiff as set forth in paragraphs 4 and 6 hereof were otherwise in compliance with Internal Revenue Code Section 6851, then in such event said Section 6851, Internal Revenue Code, is repugnant to the Constitution of the United States, and in particular to the Fifth Amendment thereof, in that it sanctions a violation of the due process clause of said Amendment, by authorizing the Secretary of the Treasury or his delegate, including any District Director, or Assistant Director of Internal Revenue, such as the Defendant herein named, to precipitously and without restraint by any objective standard of reasonableness, terminate the period for which a citizen is otherwise entitled to compute his taxable income (including deductions) and pay his tax; to make an arbitrary, capricious,

subjective determination of "income tax" of a citizen, without requirement of disclosing (by statutory notice of deficiency or otherwise) the facts and figures, if any, used to compute such "tax" and to seize the entire property and estate of a citizen pursuant to such an arbitrary determination and to threaten to sell same, all of which acts have been done with respect to Plaintiff, and for all of which, in such event, for reasons hereafter demonstrated in paragraph 12, the affected citizen may have no legal remedy. Plaintiff further states that Defendants have acted contrary to an order of the Honorable Charles M. Allen, United States District Judge for the Western District of Kentucky at Louisville entered September 20, 1972 enjoining similar behavior under similar facts in *Rambo* v. *United States*, Civil Action number 7370-A. A copy of the order of the court is appended as Exhibit E.

12(a) For the reasons stated in paragraph 9 hereof, Plaintiff cannot appeal Defendants' assessment, if in fact said seizures were pursuant to a true assessment, to the United States Tax Court.

(b) Plaintiff cannot litigate the merits of the Defendants' determination of tax by a refund suit in the United States District Court or in the United States Court of Claims by reason of the requirement of *Flora* v. *United States*, 362 U.S. 145 (1960), decision on rehearing of 357 U.S. 63 (1958), to the effect that a taxpayer must pay the full amount of what income tax the government says he owes for any period before the taxpayer may sue for the refund of any part thereof, and Plaintiff is wholly unable to comply with such requirement here as her entire estate has been seized pursuant to levy, and said estate is less than the amount determined to be owed by the Defendants.

(c) Since Defendant has seized Plaintiff's entire estate, Plaintiff is unable to furnish a bond described in Section 6851(e) of the Internal Revenue Code.

(d) For the foregoing reasons, Plaintiff has no adequate remedy at law.

13. Upon information and belief, Defendant Elmer Snyder has conspired or entered into a concert of action

with Defendant McHugh and other persons, both known and unknown, who acted under color of the laws of the Commonwealth of Kentucky together with Defendants Snyder and McHugh to deprive Plaintiff of rights secured by the Constitution and laws of the United States. Purporting to act under color of law, and in concert with certain state actors of the Commonwealth of Kentucky, Defendant Snyder caused an amount of $52,680.25 in alleged taxes to be assessed against Plaintiff knowing such tax assessment to be fraudulent and without foundation in law or fact. The purpose of his action and that of his co-conspirators was to harrass and intimidate Plaintiff rather than to collect taxes owed the United States. Defendant Snyder's acts were done maliciously with full knowledge that no such taxes were owed and with full knowledge that he had no basis for such assessment.

14. Upon information and belief, Defendant Lieutenant Donald Powers, of the Kentucky State Police, acting under color of the laws, customs, or usages of the Commonwealth of Kentucky, and under color of his apparent authority as a law enforcement officer of the Commonwealth of Kentucky, has conspired or acted in concert with Defendants McHugh and Snyder and other state and federal actors, both known and unknown, to deprive Plaintiff of rights and liberties secured to her by the Constitution and laws of the United States, and more particularly the Fifth, Fourteenth and Ninth Amendments to the Constitution of the United States. Defendant Powers' actions have contributed to the damages suffered by Plaintiff set out in Paragraph 15. His actions have been undertaken with full knowledge of his lack of legal authority. Defendant Powers has further individually defamed Plaintiff as part of a continuing conspiracy or concert of action to deprive her of her legally secured rights. The defamation consisted of saying to friends and associates of Plaintiff that she had been selling narcotics. Plaintiff states that such utterances were false and were defamatory per se. Defendant Powers has further falsely stated to Defendants McHugh and Snyder that Plaintiff has been engaged in selling narcotics. This false and malicious information was used by Defendants

McHugh and Snyder, knowing it to be false, as pretext, excuse, or justification for the unlawful tax assessments and levies complained of to deprive Plaintiff of her right to be free from the unconstitutional taking of property as secured by the Fifth and Fourteenth Amendments to the Constitution of the United States. Defendant Powers has also unlawfully seized or caused to be seized certain personal property, including $5700 in cash, belonging to Plaintiff. As part of the conspiracy or concert of action complained of, Defendant Powers together with Defendants McHugh and Snyder and other persons, both known and unknown, caused certain of the seized property to become part of the property against which Defendants McHugh and Snyder placed the unlawful levy complained of. Other personal property belonging to Plaintiff, including a gold watch, was converted by Defendant Powers to his own use. The actions of Defendant Powers, both individually and in conspiracy or concert of action with Defendants McHugh and Snyder and other persons, both known and unknown, was undertaken with malice for the purpose of denying Plaintiff the right to be free from invasion of privacy and from the unconstitutional taking of property without due process of law, rights secured to her by the Ninth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

15. Plaintiff has suffered irreparable injury as a result of Defendants' acts and omissions and unless the injunctive relief herein prayed for is granted, Plaintiff will suffer further irreparable injury.

16. As a result of Defendants' actions, Plaintiff has suffered harrassment and embarrassment, great suffering, both physical and mental, loss of respect and reputation in her community, defamation of character, loss of earnings and loss of ability to transact her business.

17. Upon information and belief, Defendants' acts were malicious, wanton, willful, vindictive and done in a spirit of mischief knowing said acts to be unlawful and in direct violation of a known existing order of this Court, entitling Plaintiff to punitive damages.

18. Plaintiff has had to employ counsel to prevent the unlawful enforcement of assessed taxes and the unlawful seizure and sale of her property.

WHEREFORE, Plaintiff prays and demands:

(1) a preliminary and permanent injunction enjoining Defendants and any agency or employee thereof to return all property heretofore seized pursuant to said levies and assessment together with interest on any money, and to release all of said levies;

(2) a preliminary and permanent injunction enjoining Defendants from collecting upon or seeking to enforce by lien, levy, sale, or otherwise, said purported assessment against Plaintiff;

(3) actual damages against the Defendants, jointly and severally, in the amount of Twenty Thousand ($20,000.00 Dollars;

(4) punitive damages against the Defendants, jointly and severally, in the amount of One Million ($1,000,000.00) Dollars;

(5) a trial by jury on all issues so triable;

(6) the costs of this action;

(7) a reasonable attorney fee for Plaintiff's attorneys;

(8) all other relief, both legal and equitable, to which Plaintiff may appear to be entitled.

/s/ Donald M. Heavrin
DONALD M. HEAVRIN
914 Republic Building
Louisville, Kentucky 40202
Telephone: 585-4324

/s/ Edwin F. Kagin, Jr.
EDWIN F. KAGIN, JR.
906 Republic Building
Louisville, Kentucky 40202
Telephone: 584-9793

Attorneys for Plaintiff

VERIFICATION

State of Kentucky
County of Jefferson

Elizabeth Jane Hall (Plaintiff), being duly sworn, deposes and says that she resides in Shelby County; that she is the Plaintiff herein; and that she has read the foregoing complaint and knows the contents thereof and that the same are true of her own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

/s/ Elizabeth Jane Hall
Plaintiff

Subscribed and sworn before me this 10th day of February, 1973.

/s/ EDWIN F. KAGIN, JR.
Notary Public
State at Large
Kentucky

My commission expires April 25, 1976.

EXHIBIT A

US TREASURY DEPARTMENT

[SEAL]

District Director
Internal Revenue Service
Louisville, Kentucky 40201

February 1, 1973

Mrs. Jane W. or Elizabeth Jane Hall
Route #5, Box 98
Shelbyville, Kentucky 40065

Dear Mrs. Hall:

You are hereby notified that I find you involved in illicit drug activities, thereby tending to prejudice or render ineffectual collection of income tax for the period 1-1-73 thru 1-30-73.

Accordingly, under authority of Section 6851 of the Internal Revenue Code and Regulations, I declare the taxable period 1-1-73 thru 1-30-73 immediately terminated and the income tax for such period immediately due and payable. Any such tax in the following amount that is unpaid will be immediately assessed against you:

TAXABLE PERIOD	TAX	PENALTY
1-1-73 thru 1-30-73	$52,680.25	

Demand for immediate payment of the full amount of this tax is hereby made.

Under Section 443 of the Internal Revenue Code you are required to file a return for your terminated taxable period. Such termination and filing does not relieve you of the responsibility for filing a return for your usual annual accounting period under Section 6012 of the Code. Any amount collected as a result of termination of the period will be applied against the above assessment

and credited against the tax finally determined to be due on your annual return.

Very truly yours,

/s/ Thomas P. McHugh
THOMAS P. MCHUGH
Acting District Director

EXHIBIT B

6125103219000-3

[SEAL]

US DEPARTMENT OF THE TREASURY
Internal Revenue Service
Director

Date Of This Notice: 2/1/73

DLN—For IRS Use Only—670—570

Jane W. or Elizabeth Jane Hall
Route 5 Box 98
Shelbyville, Ky. 40065
403-70-7498

If you find it necessary to inquire about your account, please refer to this number—

Form Number: 1040

Tax Period Ended: 1/30/73

Assessment Date: 2/1/73

Statement Of Tax Due On Federal Tax Return

This is a notice of tax due on your return identified above. The amount shown as "Balance Due" should be paid the date of this notice. Please make your check or money order payable to "Internal Revenue Service" and send it with this notice to the address shown above.

Reference	Assessment	Credit	Balance Due
	52,680.25		$52,680.25

Please return this copy with your payment to the address shown above.

Form 3552 (Part 3) (Rev. 7-70)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action 7571-G

[Filed February 16, 1973]

ELIZABETH JANE HALL, PLAINTIFF

—vs—

UNITED STATES OF AMERICA, THOMAS P. MCHUGH, ELMER SNYDER, DONALD POWERS, DEFENDANTS

TEMPORARY RESTRAINING ORDER

This cause came on to be heard on Plaintiff's verified complaint, and it appearing to the court that the Defendants are committing acts and are about to commit acts as set forth in Plaintiff's complaint, and will continue to do so unless restrained by order of this court, and that immediate and irreparable injury, loss or damage will result to Plaintiff before notice can be given and the Defendants and their attorney or attorneys can be heard in opposition to the granting of a temporary restraining order, and that Defendants, and each of them, including the unknown members of their group as alleged in the complaint, have caused certain property of Plaintiff's to be seized pursuant to a purposed jeopardy tax assessment prior to the giving of the required statutory notice and have evidenced a determination to sell Plaintiff's automobile that was so seized prior to the giving of such notice and that Defendant Powers and his agents have and are causing Plaintiff to be intimidated and harassed by unlawful searches and trespasses, it is

ORDERED, that Thomas P. McHugh, Elmer Snyder and Donald Powers, their agents, servants, employees and attorneys, and all persons in active concert and participation with them, be and they hereby are restrained from in any manner, either directly or indirectly, selling Plaintiff's automobile or any of her property and from harassing or intimidating Plaintiff in any manner including but not limited to trespassing on or seizing any of her property of whatever nature; provided, that Plaintiff first give security in the sum of $50.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, such bond to be approved by the court or by the clerk of the court; and it is further

ORDERED, that this order expired within 12 days after entry and agreement unless within such time the order for good cause shown is extended, or unless the Defendants consent that it may be extended for a longer period; and it is further

ORDERED, that Plaintiff's motion for a preliminary injunction be set down for hearing on the 28 day of Feb., 1973, at 9:30 o'clock a.m., at Ct. Rm. 2; and it is further

ORDERED, that copies of this order, together with proper summons issuing by the clerk of this court, be immediately served by the United States Marshal upon the Defendants.

Issued at 11:24 a.m., Feb. 16, 1973.

/s/ [Illegible]
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action 7571-G

[Filed February 28, 1973]

ELIZABETH JANE HALL, PLAINTIFF

—*vs*—

UNITED STATES OF AMERICA, THOMAS P. MCHUGH, ELMER SNYDER, DONALD POWERS, DEFENDANTS

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiff moves this Court for leave to amend and supplement her complaint previously filed herein in the following particulars:

1. Amending Paragraph 2 to include the following allegations of jurisdiction: "42 USC Sections 1985 and 1986"

2. Adding to the complaint the following paragraphs:

"19. Upon information and belief defendant C. A. Smith, an agent of the Internal Revenue Service, has conspired or entered into a concert of action with defendant Powers and other persons, both known and unknown, who acted under color of the laws of the Commonwealth of Kentucky together with Snyder and McHugh to deprive plaintiff of rights secured by the Constitution and laws of the United States. Purporting to act under color of law, and in concert with certain state actors of the Commonwealth of Kentucky, defendant Smith caused to be served on plaintiff a Notice of Seizure, a Notice of Sealed Bid Sale, and a Notice of Levy, set forth as Exhibits F, G and H, respectively, attached hereto and made part hereof. Defendant caused the Notice of Seizure, Notice of Sealed Bid Sale and Notice of Levy to be served knowing such to be without foundation in law or fact. The purpose of defendant's actions

and that of his co-conspirators was to harrass and intimidate plaintiff rather than secure property for the lawful collection of taxes owed the United States. Defendant Smith's acts were done maliciously with full knowledge that no such taxes were owed and with full knowledge that the Internal Revenue Service had no basis for such assessment.

"20. Upon information and belief, defendants McHugh, Snyder, Powers and Smith, together with other persons both known and unknown, have individually and inconcert of actions or conspiracy done the following:

a. On or about the first of February, 1973, defendants or their agents drove up and down plaintiff's driveway trespassing on plaintiff's property with the intent of annoying, harrassing and embarrassing the plaintiff.

b. On or about the evening of the 9th of February, 1973, defendants flew over plaintiff's house with a helicopter, hovering above her house shining a spotlight in the plaintiff's windows with the intent to annoy, embarrass, harrass and disgrace the plaintiff.

c. On or about the evening of the 6th of February, 1973, and on dates subsequent thereto, defendants or their agents parked an automobile at the end of the plaintiff's driveway and flashed automobile headlights into plaintiff's windows in an attempt to harrass, embarrass and annoy the plaintiff.

d. On or about the evening of the 13th of February, 1973, defendants came onto the plaintiff's property with flashlights and examined the vehicles of the leasee of the plaintiff.

e. On or about the 17th of February, 1973, defendants harrassed and annoyed the plaintiff by telephone calls from 11:00 a.m., until 12:00 midnight, calling the plaintiff and refusing to identify themselves, saying only "Three Guesses" when asked who was calling and further annoying the plaintiff by calling and leaving the line open for extended periods of time.

f. On or about the 19th of February, 1973, defendants broke into the cottage behind the plaintiff's house and made a shambles of the cottage damaging the cottage

and stealing a stereo and a pistol which were converted to their own use.

g. On or about the 20th of February, 1973, and on or about the 21st of February, 1973, the defendants harrassed and annoyed the plaintiff by calling and refusing to identify themselves saying only "Three Guesses" when asked to identify themselves.

h. On or about the 25th of February, 1973, defendants shot an Irish Setter dog that belonged to a co-tenant who occupied the cottage described in subsection f above.

3. Adding the following paragraph to the plaintiff's demand for relief:

"9. A preliminary and permanent injunction enjoining defendants and any agency or employee thereof from harrassing or intimidating plaintiff in any manner whatsoever and from interfering with the free exercise of any of her rights secured by the Constitution and laws of the United States.

The grounds for this motion are as follows:

(a) The amendment to Paragraph 2 merely adds additional jurisdictional grounds corresponding to acts of the defendants that were committed both before and after the filing of the initial complaint.

(b) Pursuant to Rule 15(d), Paragraphs 19 and 20 are added setting forth transactions or occurrences or events which have happened since the date of the filing of the original complaint, and the interests of justice are served by a complete disposition of the legal issues in the same forum.

(c) The addition of Paragraph 9 to the plaintiff's demand for relief recognizes the existence of a remedy provided to the plaintiff under both state and federal law, and justice demands that the plaintiff be entitled to all remedies available at law or equity.

(d) The amendments to the plaintiff's complaint will not cause any prejudice to the defendants in maintaining their defense on the merits of the case.

/s/ Donald M. Heavrin
DONALD M. HEAVRIN
906 Republic Building
Louisville, Kentucky 40202
Telephone: 585-4324

/s/ Edwin F. Kagin, Jr.
EDWIN F. KAGIN, JR.
906 Republic Building
Louisville, Kentucky 40202
Telephone: 584-9793

Attorneys for Plaintiff

VERIFICATION

State of Kentucky
County of Jefferson

Elizabeth Jane Hall (Plaintiff), being duly sworn, deposes and says that she resides in Shelby County; that she is the Plaintiff herein; and that she has read the foregoing amended and supplemental complaint and knows the contents thereof and that the same are true of her own knowledge except as to the matters therein states to be alleged on information and belief, and as to those matters she believes them to be true.

/s/ Elizabeth Jane Hall
Plaintiff

Subscribed and sworn before me this 27th day of February, 1973.

/s/ EDWIN F. KAGIN, JR.
Notary Public
State at Large
Kentucky

My Commission expires April 25, 1976.

[Certificate omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil No. 7571-G

[Filed April 12, 1973]

ELIZABETH JANE HALL, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

ANSWER OF THE DEFENDANTS THE UNITED STATES OF AMERICA, THE DISTRICT DIRECTOR OF THE INTERNAL REVENUE, AND ELMER SNYDER

Come now the defendants, the United States of America, the District Director of Internal Revenue, and Elmer Snyder, an employee of the Internal Revenue Service, by their attorney, George J. Long, United States Attorney for the Western District of Kentucky, and for their answer to the plaintiff's Complaint and Amended Complaint, state as affirmative defenses:

FIRST DEFENSE

For a first defense, the defendants allege that the Complaint and the Amended Complaint fail to state a claim upon which relief may be granted.

SECOND DEFENSE

For a second defense, the defendants allege that this Court is deprived of jurisdiction to enjoin the assessment or collection of federal taxes by Section 7421 of the Internal Revenue Code of 1954.

THIRD DEFENSE

For a third defense, the defendants allege that this Court lacks jurisdiction to consider the plaintiff's claims for money damages against them, because of the application of Section 2680(c), Title 28, United States Code.

FOURTH DEFENSE

For a fourth defense, the defendants allege that this Court lacks jurisdiction over them, for the reason that the United States has not waived sovereign immunity, and has not consented to suit against itself and its agents in an action of this nature.

FIFTH DEFENSE

For a fifth defense, the defendants allege that the plaintiff must be denied any equitable relief, by virtue of her failure to file an income tax return, as required by Section 443 of the Internal Revenue Code of 1954.

For further answer to the plaintiff's Complaint and Amended Complaint, the defendants allege as follows:

1. The defendants admit the allegations of fact contained in Paragraph No. 4 of the Complaint.

2. The defendants deny the allegations of fact and conclusions of law contained in Paragraphs Nos. 9, 10, 11, 13, 14, 15, 16 and 17 of the Complaint and Paragraph No. 20 of the Amended Complaint.

3. The defendants are without knowledge or information sufficient to form a belief as to the allegations of fact contained in Paragraphs Nos. 1, 3, and 18 of the Complaint.

4. The defendants admit that this action seeks injunctive relief and money damages, but otherwise deny all allegations of fact and conclusions of law contained in Paragraph No. 2 of the Complaint.

5. The defendants admit that the plaintiff has not filed a federal income tax return for the period from January 1, 1973, through January 30, 1973, but otherwise deny all allegations of fact and conclusions of law contained in Paragraph No. 5 of the Complaint.

6. The defendants admit that a Volkswagon automobile belonging to the plaintiff has been levied upon and seized by employees of the Internal Revenue Service, and that said automobile has been offered for sale, but the defendants are otherwise without knowledge or information sufficient to form a belief as to the allegations of fact contained in Paragraph No. 6 of the Complaint.

7. The defendants admit that the Internal Revenue Service has not mailed to the plaintiff a notice of deficiency for the period January 1, 1973, through January 30, 1973, but deny that there exists any obligations to mail any such notice, and otherwise deny all allegations of fact and conclusions of law contained in Paragraph No. 7 of the Complaint.

8. The defendants admit that, had not the Orders of this Court intervened, the Internal Revenue Service would have sold certain property belonging to the plaintiff, but otherwise deny all allegations of fact and conclusions of law contained in Paragraph No. 8 of the Complaint.

9. The defendants admit that the plaintiff cannot immediately petition the United States Tax Court for a redetermination of her assessed liability for the aforesaid 30-day period, but the defendants are otherwise without knowledge or information sufficient to form a belief as to the allegations of fact contained in Paragraph No. 12 of the Complaint.

10. The defendants admit that a certain Notice of Seizure, a certain Notice of Sealed Bid Sale, and a certain Notice of Levy were served upon the plaintiff by the Internal Revenue Service, but otherwise deny all allegations of fact and conclusions of law contained in Paragraph No. 19 of the Amended Complaint.

WHEREFORE, the defendants, the United States, the District Director of Internal Revenue, and Elmer Snyder,

demand judgment dismissing this action, with all costs charged to the plaintiff.

GEORGE J. LONG
United States Attorney

By: _____
Assistant United States Attorney

RICHARD F. MITCHELL
Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing Answer was served by mailing in the United States mail, postage prepaid, on the 10 day of April, 1973, as follows:

Donald M. Heavrin, Esquire
914 Republic Building
Louisville, Kentucky 40202

Edwin F. Kagin, Jr., Esq.
906 Republic Building
Louisville, Kentucky 40202

/s/ _____
RICHARD F. MITCHELL
Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530

SUPREME COURT OF THE UNITED STATES

No. 74-75

UNITED STATES ET AL., PETITIONERS,

v.

ELIZABETH JANE HALL

ORDER ALLOWING CERTIORARI. Filed October 15, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is set for oral argument in tandem with No. 73-1808.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 562750 61

Supreme Court, U. S.
FILED
AUG 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-75

UNITED STATES OF AMERICA, ET AL. - Petitioners

versus

ELIZABETH JANE HALL - - - Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

DONALD M. HEAVRIN
914 Republic Building
Louisville, Kentucky 40202

EDWIN F. KAGIN, JR.
1106 Citizens Plaza
Louisville, Kentucky 40202

Of Counsel:
MICHAEL GRAVES
6864 East Fifty-Seventh Street
Tulsa, Oklahoma

Attorneys for Respondent

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-75

UNITED STATES OF AMERICA, ET AL. - *Petitioners*

v.

ELIZABETH JANE HALL - - - *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Elizabeth Jane Hall, opposes the Petition for Writ of Certiorari filed by the Solicitor General on behalf of the United States of America and the District Director of Internal Revenue for the District of Kentucky to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

In the alternative the respondent states that if the Court should grant the Petition for Certiorari, this case should be considered on its own merits and should not be held in abeyance until *United States* v. *Rambo*, 492 F. 2d 1060 (C.A. 6) and *Laing* v. *United States*, 406 F. 2d 853 (C.A. 2) 1974, are decided.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Kentucky and the opinion of the United States Court of Appeal for the Sixth Circuit are contained in the petition, pages 1a-10a.

JURISDICTION

A jurisdictional statement is set forth at page 2 of the petition.

QUESTIONS PRESENTED

I. Whether the Commissioner may terminate a taxpayer's taxable year under Section 6851 of the Code and assess taxes for the terminated period without issuing a notice of deficiency under Section 6212(a); and if the Commissioner fails to send the deficiency notice is the taxpayer barred from seeking injunctive relief by the Anti-Injunction Act?

II. Whether the instant case should be held in abeyance until the other pending cases are decided?

STATUTES INVOLVED

The statutes involved are set out in the petition, pages 13a-28a.

COUNTERSTATEMENT OF FACTS

Jane Hall's problems began when her husband, Sterling Hall, was arrested in Brownsville, Texas, convicted, and sentenced under the Young Adult Offender's Act for trafficking in marijuana. Following his confinement, Lieutenant Donald Powers, a Kentucky State Trooper, who apparently believes that a wife must necessarily be involved in her husband's illegal activities, obtained a Search Warrant and along with approximately ten State Troopers fell upon the home of Mrs. Hall, presented the Search Warrant, and thoroughly searched the premises. The search produced a "minuscule quantity" of drugs.

These drugs were found in obscure places, and Mrs. Hall has consistently stated that the drugs were the property of her husband and that she did not know these drugs were in her home. After the search was completed, Powers arrested Mrs. Hall and charged her with trafficking in marijuana, but he was obviously dissatisfied with the results of his criminal investigation because he decided to take further punitive action against Mrs. Hall by proceeding to the office of the Internal Revenue Service and advising the Regional Director that he had discovered the existence of a drug pusher in the person of Elizabeth Jane Hall.

Acting on this information, which was totally erroneous, the Internal Revenue Service proceeded to the home of Mrs. Hall on February 1, 1973, and hand delivered a letter that advised her that she owed the Internal Revenue Service $52,680.25 for the period

commencing January 1, 1973, and ending January 31, 1973. This incredible bill, according to Internal Revenue, was for the income that she had received from the sale of drugs during this thirty-one day period.

Mrs. Hall was astounded when the Agent for Internal Revenue demanded immediate payment in the amount of $52,680.25, and when she advised him she did not have the money, he proceeded to attach her property and to tow off her automobile. Shortly thereafter, notice was given by Internal Revenue that her car would be sold at a public auction.

When Mrs. Hall received notice that her assets were to be sold, she was literally helpless. Internal Revenue Service had not sent her a deficiency notice, which is a jurisdictional prerequisite to filing suit in Tax Court under Section 6861(b). Her total assets were minuscule compared to the amount of the tax bill. Therefore, she could not pay the assessment and file a refund suit in the District Court under the full payment rule of *Flora* v. *United States,* 362 U. S. 145 (1960); and because Internal Revenue Service had taken all of her assets there was no way for her to post an adequate bond. Thus, Mrs. Hall took the only alternative available to her and filed suit in the United States District Court and asked that Internal Revenue Service be enjoined from selling her property.

ARGUMENT

A. Response to Petitioner's Arguments On the Merits

The power to terminate a taxpayer's taxable year has been vested in the Commissioner of Internal Revenue for many years. However, the power was seldom used until recently when Internal Revenue Service expanded its operation and got into the business of stamping out drug traffic.[1] In the Petition for Certiorari, the United States at page 6 states there are seventy cases pending in Federal Court involving this question and for the fiscal year of 1973, more than 1,800 taxable years were terminated with assessments in excess of Sixty Million Dollars. From these statistics, it is obvious that Internal Revenue Service now considers itself a law enforcement agency and, as such, has started a nationwide campaign against individuals suspected of being in the drug business.

The respondent concedes stamping out drug traffic is a noble purpose but the respondent respectfully asks what happens when an innocent citizen is trapped in the web of bureaucratic zeal? The United States District Court in granting the preliminary injunction noted the respondent had literally been deprived of all of her assets and had been denied any remedy. The Sixth Circuit affirmed the decision of the United States District Court and the respondent respectfully submits

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[1]Silver, "Terminating the Taxpayer's Taxable Year: How the Internal Revenue Service uses it against narcotic suspects." 40 Journal of Taxation 110 (February, 1974).

these decisions are correct and accurate statements of the law and, therefore, there is no need to grant the Petition for Certiorari.

B. If Certiorari Is Granted, This Case Should Not Be Held in Abeyance Because the Facts of This Case Are Materially Different From the Facts of the Other Cases Now Pending Before This Court.

The respondent concedes there is an apparent conflict between the various Circuit Courts and should this Court grant certiorari in any of the pending cases, the respondent respectfully requests the instant case be considered on its own merits and not held in abeyance as requested by the petitioner. The respondent makes this request because her case is vastly different from the three principle cases now pending before this Court.

In *United States* v. *Rambo,* 492 F. 2d 1060 (C.A. 6, 1974) Petition for Certiorari pending, No. 73-2005, the respondent, Rambo, admitted he was a conduit for the passage of chemical compounds used to manufacture illegal drugs. Rambo had $12,661.25 in his bank account at Liberty National Bank, $2,200.00 in cash, three automobiles, and at the time of his arrest, he was in possession of enough tranquilizers to fill a briefcase.

In *Laing* v. *United States,* 406 F. 2d 853 (C.A. 2, 1974) Certiorari pending No. 73-1808, the Petitioner, Laing, was a resident of New Zealand and had entered the United States on a B-2 visa. When he attempted to leave the United States and to enter Canada, the Canadian officials refused him entry and when he returned to the United States, the Custom Officials found a suitcase containing $310,000.00 in the engine compartment of his automobile. Ultimately, the Internal Revenue Service assessed a tax against Laing in the amount of $195,985.55 for the period of January 1st to June 24, 1972.

In *Irving* v. *Gray,* 497 F. 2d 20 (C.A. 2), the petitioner, Irving, was a resident of Ibiza and when his involvement in the Howard Hughes hoax was discovered, Internal Revenue knew that Irving had obtained $650,000.00 from McGraw-Hill Publishing Company and that Merrill Lynch was holding certain funds on his behalf.

In the case at bar, it is obvious that Internal Revenue grabbed a figure out of the air, put it in a form letter, and proceeded to the home of Mrs. Hall to literally destroy her financially without regard to the requirements of the Internal Revenue Code or the due process requirements of the Constitution.

At no time has the Government offered any evidence to the District Court as to the basis or method of computation of its assessment for the terminated period, nor has the District Director offered any supporting evidence as to his finding that the respondent was involved in illicit drug activities.

Mrs. Hall had one Volkswagen, and less than One Hundred Dollars in the bank. She was not trying to leave the country, she was not residing outside the country, and she was not involved in a drug sales conspiracy.

This case dramatically illustrates the danger of allowing a bureaucrat the power and the opportunity to destroy a citizen without any due process protections. In fact in the instant case, the conduct of Internal Revenue Service and the conduct of the State Trooper, Powers, was so outrageous that the United States District Court not only enjoined them from the sale of the respondent's property but also enjoined them from trespassing on her property, and from harassing her or intimidating her in any manner. (A copy of the preliminary injunction may be found in the Petition at Page 5a.)

Under these circumstances it is not surprising the petitioner has requested this Court to hold up the Writ of Certiorari until the *Rambo* and *Laing* cases are decided. It would certainly be in the petitioner's interest to have the *Hall* case decided on the basis of the ruling handed down in *Rambo* and *Laing*.

The respondent respectfully submits the law is always tempered by the facts and the facts in the instant case are so grossly different from the facts of the cases cited above the respondent requests if certiorari is granted in any of the pending cases that this Court consider the instant case on its own merits.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied. Alternatively, the Respondent requests that this case be considered on its own merits and not held in abeyance until the other cases are decided.

Respectfully submitted,

DONALD M. HEAVRIN
914 Republic Building
Louisville, Kentucky 40202

EDWIN F. KAGIN, JR.
1106 Citizens Plaza
Louisville, Kentucky 40202

Of Counsel:

MICHAEL GRAVES
6864 East Fifty-Seventh Street
Tulsa, Oklahoma

Counsel for Respondent

Supreme Court, U. S.
FILED
DEC 13 1974
MICHAEL RODAK, JR., CLERK

Nos. 74-75 and 73-1808

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

ELIZABETH JANE HALL

JAMES BURNETT MCKAY LAING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND SECOND CIRCUITS

BRIEF FOR THE PETITIONERS IN NO. 74-75 AND FOR THE RESPONDENTS IN NO. 73-1808

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
STUART A. SMITH,
Assistant to the Solicitor General,
ROBERT S. WATKINS,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-75

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

ELIZABETH JANE HALL

No. 73-1808

JAMES BURNETT MCKAY LAING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND SECOND CIRCUITS

BRIEF FOR THE PETITIONERS IN NO. 74-75 AND FOR THE RESPONDENTS IN NO. 73-1808

OPINIONS BELOW

No. 74-75. The opinion and order of the district court (Pet. App. A 1a-6a) are not reported. The opin-

ion of the court of appeals (Pet. App. B 7a–10a) is reported at 493 F. 2d 1211.

No. 73–1808. The opinion of the district court (Pet. App. B 19–27) is reported at 364 F. Supp. 469. The opinion of the court of appeals (Pet. App. A 15–18) is at 496 F. 2d 853.

JURISDICTION

No. 74–75. The judgment of the court of appeals (Pet. App. C 11a–12a) was entered on March 12, 1974. By order dated May 31, 1974, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including August 9, 1974. The petition for a writ of certiorari was filed on August 5, 1974, and was granted on October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

No. 73–1808. The judgment of the court of appeals was entered on May 2, 1974. The petition for a writ of certiorari was filed on May 31, 1974, and was granted on October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Anti-Injunction Act (Section 7421(a) of the Internal Revenue Code of 1954) bars a suit in any court by any person to restrain the assessment or collection of any tax. The provision contains an exception for cases where the Commissioner is required to issue a notice of deficiency under Section 6212(a).

The question presented is whether the Commissioner may terminate a taxpayer's taxable year under Section 6851 of the Code and assess and collect the taxes due for the terminated period without issuing a notice of deficiency under Section 6212(a), so that a suit to enjoin the Commissioner's assessment and collection of taxes would be barred under the Anti-Injunction Act.

STATUTES INVOLVED

The pertinent provisions of Sections 6201, 6211, 6212, 6213, 6331, 6332, 6335, 6511, 6532, 6851, 6861, 6863, 7421, and 7422 of the Internal Revenue Code of 1954, are set forth in Appendix A, *infra*, pp. 53–66.

STATEMENT

These cases present the identical question whether the Anti-Injunction Act, 26 U.S.C. 7421(a), bars a suit to enjoin the assessment and collection of income taxes pursuant to the Commissioner's termination of a taxpayer's taxable year under Section 6851 of the Internal Revenue Code of 1954, where the Commissioner does not issue a notice of deficiency under Section 6212(a). In No. 74–75, the Sixth Circuit has held that the Anti-Injunction Act is not applicable; in No. 73–1808, the Second Circuit has upheld the government's position that the Act bars such a suit. Because of the common issue, the Court has scheduled the oral arguments in these cases in tandem. In order that the Court may consider the single legal issue involved in the factual context of both cases, we are filing this single brief for the government, as petitioner in No. 74–75, and as respondent in No. 73–1808.

No. 74–75. Respondent brought this action to enjoin the Commissioner's assessment and collection of taxes.

The suit was brought after the District Director of Internal Revenue for the District of Kentucky notified respondent by letter on February 1, 1973, that he found her to be involved in illicit drug activities tending to prejudice or render ineffectual the collection of income tax for the period January 1, 1973 through January 30, 1973. Pursuant to his authority under Section 6851 of the Internal Revenue Code of 1954, he declared her taxable year commencing January 1, 1973, to be terminated as of January 31, 1973, and the income tax for that period to be immediately due and payable. He further stated that the tax owed for the terminated period was $52,680.25, and would be assessed immediately (A. 11–12;[1] Pet. App. A 1a; Pet. App. B 8a).

Respondent was unable to pay the tax. Pursuant to its authority under Section 6331 of the Code, the Internal Revenue Service levied on all of her property, which included her automobile and her bank account. The bank paid the balance of the account over to the Internal Revenue Service, which received bids on respondent's automobile (Pet. App. A 1a; Pet. App. B 8a).

Respondent thereupon commenced this action in the United States District Court for the Western District of Kentucky seeking injunctive relief with respect to the assessment against her (Pet. App. A 1a). The district court granted a preliminary injunction requiring the immediate return of respondent's automobile upon her posting a bond sufficient to

[1] "A." references are to the record appendix.

cover its fair market value. The court further barred the Internal Revenue Service from "seizing or levying upon any of her property of whatever nature * * *" (Pet. App. A 5a–6a). In the district court's view, when the Internal Revenue Service terminates a taxpayer's taxable year under Section 6851 and assesses taxes for the terminated period, it must issue a notice of deficiency under Section 6212(a). Because the Internal Revenue Service did not issue such a notice of deficiency to respondent, the district court held that the bar of the Anti-Injunction Act, which prohibits suits "for the purpose of restraining the assessment or collection of any tax," was not applicable (Pet. App. A 1a–4a).

The court of appeals affirmed *per curiam* (Pet. App. B 7a–10a). Invoking its earlier decision in *Rambo* v. *United States*, 492 F. 2d 1060 (C.A. 6), petition for a writ of certiorari pending, No. 73–2005, the court of appeals concluded that "*Rambo* is decisive of all the legal questions involved in our case and we will follow it" (Pet. App. B 9a).

No. 73–1808. Petitioner James Burnett McKay Laing is a citizen of New Zealand. He entered the United States from Canada on a temporary visitor's visa on May 31, 1972. On June 24, 1972, he and two companions were refused entry into Canada by Canadian officials. As a result, they returned to the United States where they were stopped at the border by United States Customs officials in Derby, Vermont. Upon a search of the vehicle in which petitioner and his companions were travelling, the customs offi-

cers found concealed in the engine compartment a suitcase containing more than $300,000 in United States currency (Pet. App. B 20).

After notification by the customs officials, the District Director of Internal Revenue, in Burlington, Vermont, determined that petitioner and those accompanying him were in the process of putting their assets beyond the reach of the government by removing them from the United States, which would prejudice or render ineffectual the collection of income tax. Pursuant to the authority under Section 6851(a) of the Internal Revenue Code of 1954, the District Director declared the taxable years of petitioner and his two companions immediately terminated. Assessments were made against each individual of $310,000[2] for the period January 1, 1972, through June 24, 1972.

After they refused to pay the tax, the money found hidden in the engine compartment of the automobile was levied upon and seized by the Internal Revenue Service. A portion of this sum was applied to the tax assessed against petitioner (Pet. App. B 20–21).

Petitioner thereupon commenced this suit in the United States District Court for the District of Vermont to enjoin the continued possession of the seized funds by the Internal Revenue Service. He urged that the bar of the Anti-Injunction Act was not applicable because the Internal Revenue Service had not issued a notice of deficiency to him prior to the seizure of the funds (Pet. App. B 19).

[2] The assessment against petitioner was subsequently abated to $195,985.55 (Pet. App. B 21).

Following *Irving* v. *Gray*, 479 F. 2d 20 (C.A. 2), the district court held that a notice of deficiency is not required when, as here, the Internal Revenue Service terminates a taxpayer's taxable year pursuant to Section 6851. It accordingly dismissed petitioner's suit for injunctive relief as prohibited by the Anti-Injunction Act[3] (Pet. App. B 19–27). The district court further determined that petitioner did not meet the narrow two-fold exception to the Anti-Injunction Act established by this Court in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, and most recently reaffirmed in *Bob Jones University* v. *Simon*, No. 72-1470, decided May 15, 1974; and *Alexander* v. *"Americans United", Inc.*, No. 72-1371, decided May 15, 1974. It concluded that petitioner did not demonstrate that: (1) under no circumstances would the government ultimately prevail on the merits of its tax claim; and (2) he was without an adequate remedy at law.[4]

The court of appeals adhered to its decision in *Irving* and affirmed *per curiam* (Pet. App. A 15–18).

SUMMARY OF ARGUMENT

A

In enacting the Anti-Injunction Act, Congress has recognized that the prompt and efficient collection of the federal revenues is a paramount national concern.

[3] The district court also rested its decision upon the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201) (Pet. App. B 22).

[4] In fact, petitioner has commenced a refund suit which is currently pending in the district court (D. Vt.—Civ. No. 73-137). The parties have filed a stipulation in that case that the trial be delayed until the decision by this Court in this case.

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This statute prohibits the courts from granting injunctions against the assessment or collection of taxes. As this Court has observed, the Act reflects the desire of Congress to avoid the possibility that the courts could interfere with the orderly process of collecting the revenues upon which the government depends for its continuing existence.

The prefatory clause of the Anti-Injunction Act creates a qualified exception to the prohibition against injunctions. This statutory exception involves those cases which are subject to the jurisdiction of the Tax Court, unless the Commissioner believes that collection will be jeopardized by delay. Pursuant to Section 6213(a), if the Commissioner takes steps to assess or collect the deficiency before the taxpayer has had an opportunity to invoke the jurisdiction of the Tax Court and jeopardy does not arise from delay, then the taxpayer may seek to enjoin the Commissioner's action in the district court.

In the present cases, the Commissioner exercised his authority under Section 6851 of the Code to terminate the taxable periods of the taxpayers and to demand immediate payment of the taxes for their terminated periods. Section 6851 is designed to deal with the taxpayer who is believed to be attempting to evade payment of anticipated taxes by placing himself or his property beyond the reach of the Service before the end of the taxable year. The issue in these cases upon which the courts below have divided is whether the prefatory exception in the Anti-Injunction Act is applicable where the Commissioner terminates a taxpayer's taxable year under Section 6851, without the

issuance of a notice of deficiency. If, as we contend, and the Second Circuit has held in No. 73–1808, the Commissioner's termination of a taxable year does not require the issuance of a notice of deficiency, and is not reviewable by the Tax Court, the exception is not applicable and these suits are barred by the Anti-Injunction Act.

B

1. Nothing in the statutory language of Section 6851 supports the conclusion that the Commissioner is required to issue a notice of deficiency in connection wth the termination of a taxable year. The Sixth Circuit in No. 74–75 and the other courts which have held that the Commissioner must issue a notice of deficiency under Section 6851 have relied in part upon the existence of such a requirement under Section 6861. That provision states that if the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he can immediately assess such deficiency. But those decisions are based upon the erroneous assumption that the assessment authority in the case of a Section 6851 termination derives from Section 6861. That is not the case. Section 6861 does not contain any authority to make assessments. The power to make an assessment after the termination of a taxable year under Section 6851 or upon a finding of jeopardy under Section 6861, resides in Section 6201, the general statutory provision for assessments.

Moreover, Sections 6851 and 6861 are separate and distinct statutory provisions. They cannot be merged nor are their terms freely transferable from one to

another. Unlike Section 6851, which involves cutting off the taxable year at any time, Section 6861 can only be invoked after the date when the taxes for a full past taxable year are due to be paid, *i.e.*, after April 15 of the following year. Simply put, Section 6851 advances the date when taxes are due and payable, while Section 6861 advances the time for collection of taxes which are already overdue. Thus, the requirement that the Commissioner issue a notice of deficiency after the making of a Section 6861 jeopardy assessment has no significance for purposes of Section 6851.

2. The legislative history of the pertinent statutory provisions reinforces the statutory analysis that the assessment authority for the taxes made "immediately due and payable" under Section 6851 is not Section 6861 but Section 6201. Indeed, from 1918 to 1921, the statutory predecessor of Section 6851 stood in the revenue act without the predecessor of Section 6861. But even after the introduction of the predecessor of Section 6861 in 1921, its inclusion as a proviso to the appeal procedure established by that revenue act indicates that it was simply intended to provide for the early assessment of taxes where collection was jeopardized by the necessity of awaiting the outcome of an administrative appeal.

However, the scope of this administrative appeal, which was subsequently changed to review by the independent Board of Tax Appeals, never covered assessments made in connection with the termination power. Hence, there is no basis to the claim that the Commissioner must issue a notice of deficiency in such cases in order to provide access to the Tax Court.

Indeed, the Tax Court itself has consistently held that it has no jurisdiction to redetermine tax liabilities for terminated periods. The Commissioner's administrative instructions as set forth in the Internal Revenue Manual for revenue agents are to the same effect.

Moreover, the legislative evolution of Sections 6851 and 6861 and the creation of the Board of Tax Appeals (now the Tax Court) demonstrate that the amount assessed pursuant to a Section 6851 termination is not a "deficiency" within the meaning of Section 6211. That term only applies to an underpayment where the taxpayer files a full year return or where he fails to file a full year return as of the prescribed due date. Thus, a "deficiency" can only arise with respect to a full taxable year and not a terminated taxable period created by the exercise of the Commissioner's Section 6851 power.

The requirement that the Commissioner issue a notice of deficiency does not, therefore, apply to the Section 6851 termination of a taxable year prior to its normal conclusion. Since the Tax Court's jurisdiction depends upon the issuance of a notice of deficiency, that court cannot review the correctness of an assessment for a terminated period.

C

Contrary to the suggestion of some of the lower courts, there are no constitutional objections to the summary collection of income taxes determined to be due under Section 6851 if the Commissioner is not required to issue a notice of deficiency in such a case. The constitutional reservations expressed by these

courts were prompted by their concern that if the Commisioner were not required to issue a notice of deficiency in these circumstances, the taxpayer could not gain immediate access to the Tax Court to review the Commissioner's determination. There is, however, no constitutional requirement that all tax disputes be adjudicated by the Tax Court.

Lack of immediate access to the Tax Court by the taxpayers in these cases does not mean they are deprived of any particular advantage provided by that court or are without any effective judicial remedy. Indeed, there are three judicial remedies available to these taxpayers. First, they can file a claim for refund for the short period and commence a refund suit on that claim either in the district court or in the Court of Claims. The jurisdiction of those courts is broadly cast under 28 U.S.C. 1346 and does not, as does that of the Tax Court, depend upon the existence of a deficiency. Secondly, they may await the end of the full taxable year and file a full year return and a claim for refund for the full taxable year. In these circumstances, they may again commence a refund suit in the district court or in the Court of Claims. Finally, the taxpayers may await the close of the normal taxable year and the Commissioner's issuance of a statutory notice of deficiency, if a deficiency exists for the full year. Once a statutory notice is issued, the taxpayers can seek a redetermination in the Tax Court.

As this Court long ago held in *Phillips* v. *Commissioner*, 283 U.S. 589, 595, the summary administrative collection of taxes is constitutionally permissible as long as an "adequate opportunity is afforded for a

later judicial determination of the legal rights * * *." The variety of remedies available to a taxpayer subject to a Section 6851 termination fully satisfies the constitutional requirements of due process.

ARGUMENT

THESE SUITS TO ENJOIN THE ASSESSMENT AND COLLECTION OF TAXES ARE BARRED BY THE ANTI-INJUNCTION ACT BECAUSE THE COMMISSIONER IS NOT REQUIRED TO ISSUE A NOTICE OF DEFICIENCY TO A TAXPAYER WHOSE TAXABLE YEAR IS TERMINATED UNDER SECTION 6851 OF THE CODE

A. INTRODUCTION

These cases present a procedural issue of considerable importance in the administration of the revenue laws. The federal Anti-Injunction Act, 26 U.S.C. 7421 (a), Appendix A, *infra*, p. 65, states that "Except as provided in sections 6212 (a) and (c), [and] 6213(a) * * *, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The statute was enacted in 1867 [5] in order to prevent the same type of injunctive suits which had swept over the state taxation systems from similarly inundating the federal tax system. This Court thereafter recognized the congressional policy which underlay the passage of the Act, namely, that if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government itself would be threatened. See *State Railroad Tax Cases*, 92 U.S.

[5] The statute originated as Section 10 of the Revenue Act of March 2, 1867, c. 169, 14 Stat. 471, 475, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

575, 613; *Cheatham* v. *United States*, 92 U.S. 85, 89; *Snyder* v. *Marks*, 109 U.S. 193–194.[6]

The question presented is whether the qualified prefatory exception in the Anti-Injunction Act—"Except as provided in sections 6212 (a) and (c) [and] 6213 (a) * * *"[7]—is applicable where the Commissioner terminates a taxpayer's taxable year under Section 6851, without the issuance of a notice of deficiency. As we shall demonstrate *infra*, these suits are barred by the Anti-Injunction Act because the Commissioner is not required to issue such a notice after his termination of a taxable year under Section 6851. The exception to the Act which relates to cases over which the Tax Court has jurisdiction does not apply here because that court has no jurisdiction to adjudicate an assessment of taxes made "immediately due and payable" under Section 6851.

[6] The statutory prohibition on injunctions against tax assessment or collection activities by the Treasury is subject to one narrowly limited exception created by this Court. In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7, the Court unanimously held that a taxpayer could obtain an injunction only if he satisfied a two-fold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; secondly, he must show that "equity jurisdiction otherwise exists" because of the threat of irreparable injury for which there is no adequate legal remedy. Only last Term, the Court reaffirmed the *Williams Packing* rule and upheld the bar of the Act against injunctive suits in connection with tax-exempt status. See *Bob Jones University* v. *Simon*, No. 72–1470, and *Alexander* v. "*Americans United*", *Inc.*, No. 72–1371, both decided May 15, 1974. See also *United States* v. *Americans Friends Service Committee*, No. 73–1791, decided October 29, 1974.

[7] There is another statutory exception for civil actions by persons other than taxpayers under Section 7426 (a) and (b) (1). That exception is not applicable here.

In these cases, the Commissioner exercised his power under Section 6851, Appendix A, *infra*, pp. 60–62, to terminate the taxable year of the taxpayers and to demand immediate payment of the taxes for their terminated periods. This provision has its roots in almost the very beginnings of the modern income tax for it was first enacted in virtually identical terms as Section 250(g) of the Revenue Act of 1918, c. 18, 40 Stat. 1057. The statute is designed to deal with the taxpayer who is believed to be bent on evading payment of anticipated taxes by placing himself or his property beyond the reach of the Service before the end of the taxable year. In order to meet this contingency, Section 6851 provides that the Commissioner is authorized to terminate the taxable year when he finds "that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax * * * unless such proceedings be brought without delay * * *."

Perhaps the most notable instance of the exercise of the Commissioner's Section 6851 power involved the termination of the taxable years of Clifford and Edith Irving. Clifford Irving was the perpetrator of the so-called "Howard Hughes hoax" which involved his receipt under false pretences of $765,000 from a publishing company. When the deception was discovered, the Internal Revenue Service terminated their taxable years, finding that it was likely that Irving and his wife would abscond with the money,

and levied on some of their property. Both the district court and the court of appeals rejected the Irvings' claim for injunctive relief, which was identical in all respects to the suits involved in these cases. See *Irving* v. *Gray*, 344 F. Supp. 567 (S.D.N.Y.), affirmed, 479 F. 2d 20 (C.A. 2).

Here, as in *Irving*, it is beyond doubt that the statutory grounds for the exercise of the termination power have been satisfied in both cases.[8] In *Hall*, No. 74–75, after the state police seized dangerous drugs on respondent's premises, the Commissioner found her to be involved in illicit drug activities tending to prejudice or render ineffectual the collection of income taxes (Pet. App. A 1a; Pet. App. B 8a). Similarly, in *Laing*, No. 73–1808, petitioner was attempting to remove approximately $300,000 in cash out of the United States in a suitcase hidden in the engine compartment of his automobile (Pet. App. A 17).

However, the question upon which the Sixth and Second Circuits have divided in these cases is whether the Commissioner is required to issue a notice of deficiency to a taxpayer whose taxable year is terminated under Section 6851.[9] If, as we contend and the

[8] Section 6851 provides that the Commissioner's finding that the termination of the taxpayer's taxable year is appropriate "shall be for all purposes presumptive evidence of jeopardy" in any court proceeding to enforce collection. Neither taxpayer in these cases has introduced any evidence to rebut this presumption.

[9] Prior to *Laing*, the Second Circuit had already held in *Irving* v. *Gray*, 479 F. 2d 20, that the Commissioner was not required to issue a notice of deficiency in a Section 6851 termination. The Seventh Circuit had similarly upheld the government's position in *Williamson* v. *United States*, 31 A.F.T.R. 2d 73–800 (unreported order of April 8, 1971). In addition to the two adverse decisions of the Sixth Circuit in No. 74–75

Second Circuit held in *Laing*, No. 73–1808, there is no such requirement, the Commissioner's failure to issue such a notice does not trigger the prefatory exception to the bar of the Anti-Injunction Act.

The conclusion of the Sixth Circuit in *Hall*,[10] as well as the other courts which have held that the Com-

and *Rambo* v. *United States*, 492 F. 2d 1060, petition for a writ of certiorari pending, No. 73–2005, the Fifth Circuit in *Clark* v. *Campbell*, 501 F. 2d 108, *Aguilar* v. *United States*, 501 F. 2d 127, and *Rodger* v. *United States*, 502 F. 2d 1165 (unpublished opinion of October 2, 1974), has held that such a notice is required to be issued. Currently, a number of cases involving this issue are pending in the courts of appeals. See *Boyd* v. *United States*, 33 A.F.T.R. 2d 74–1246 (E.D. Pa.), appeal pending (C.A. 3—No. 74–1565); *Schreck* v. *United States*, 301 F. Supp. 1265, reaffirmed on reconsideration, 375 F. Supp. 742 (D. Md.), appeal pending (C.A. 4—No. 74–1566); *Rogers* v. *O'Donnell* (M.D. Fla.—No. 72–246–ORL–CIV, unpublished findings of fact and conclusions of law filed March 6, 1974), appeal pending (C.A. 5—No. 74–1731); *Basham* v. *United States* (W.D. Ky.—CIV. No. 7743–G, unpublished order entered July 18, 1973) and *Hudson* v. *United States* (W.D. Ky.—CIV. No. 7744–G, unpublished order entered July 18, 1973), appeals pending (C.A. 6—Nos. 73–2196 and 73–2197) (consolidated); *Parker* v. *O'Hara*, 33 A.F.T.R. 2d 74–1258 (E.D. Tenn.), appeal pending (C.A. 6—No. 74–1674); *Lizner* v. *McCanless*, 356 F. Supp. 398 (D. Ariz.), appeal pending (C.A. 9—Nos. 73–2037 and 73–2038); *Woods* v. *McKeever*, 32 A.F.T.R. 2d 73–5967 (D. Ariz.), appeal pending (C.A. 9—No. 74–1133); *Williams* v. *United States*, 373 F. Supp. 71 (D. Nev.), appeal pending (C.A. 9—No. 74–1192); *Avery* v. *Sparley* (E.D. Wash.—No. 73–3860, unreported memo decision filed November 9, 1973), appeal pending (C.A. 9—No. 74–1625); *Shaw* v. *McKeever*, 33 A.F.T.R. 2d 74–1027 (D. Ariz.), appeal pending (C.A. 9—No. 74–2416). See also *Musso* v. *Commissioner*, 32 T.C.M. 849, appeal pending (C.A. 5—No. 73–3916); *Jones* v. *Commissioner*, 62 T.C. 1; and *Riley* v. *Commissioner*, 32 T.C.M. 847.

[10] The most extensive statement of the Sixth Circuit's views is set forth in *Rambo* v. *United States*, 492 F. 2d 1060, petition for a writ of certiorari pending, No. 73–2005. In *Hall*, No. 74–75, the court below concluded that its prior *Rambo* decision was controlling (Pet. App. B 9a).

missioner is required to issue a notice of deficiency in connection with a Section 6851 termination is based upon two erroneous assumptions: (1) that the assessment power with respect to amounts declared immediately due and payable under Section 6851 derives from Section 6861; and (2) that the amount determined to be "immediately due and payable" is a "deficiency" under Section 6211(a).

In our view, these assumptions are based upon a demonstrably incorrect reading of the legislative history of these provisions, which we discuss in detail in Part B.2, *infra*, pp. 27–45. That history indicates that Sections 6851 and 6861 represent discrete statutory schemes designed to collect taxes under exigent circumstances of markedly different degree. The assessment authority of both provisions is found in Section 6201(a). Therefore, the requirement that the Commissioner issue a notice of deficiency under Section 6861 cannot be incorporated into Section 6851 which is involved in these cases. Moreover, the evolution of the statutory provisions establishes that the definition of deficiency does not cover the emergency assessment made after a Section 6851 termination. That type of determination was never intended to be reviewable by the Tax Court. We believe that these conclusions are compelled by both the language and structure of the statutory scheme for the collection of taxes, and the legislative history to which we now turn.

B. IN LIGHT OF ITS LANGUAGE, STRUCTURE, AND LEGISLATIVE HISTORY, THE STATUTORY SCHEME FOR THE COLLECTION OF TAXES WHERE THE REVENUE IS IN JEOPARDY INDICATES THAT THE COMMISSIONER IS NOT REQUIRED TO ISSUE A NOTICE OF DEFICIENCY IN CONNECTION WITH THE TERMINATION OF A TAXPAYER'S TAXABLE YEAR

1. The statutory language and structure

a. Although our tax collection system depends primarily upon honest self-reporting and self-assessment, Congress has recognized that there would be instances where the Treasury would have to take immediate affirmative action in order to safeguard the collection of taxes. Thus, Section 6851(a) requires the Secretary or his delegate[11] to terminate the taxable year if he finds that a taxpayer "designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax * * *." Notice of the termination must be given the taxpayer and a demand made

[11] The Secretary's authority has been delegated to the district directors. See Treasury Regulations, Section 1.6851-1. We are advised by the Internal Revenue Service that its agents are instructed that terminations of taxable years and assessments must be used sparingly and that such actions must be personally approved by the district director or the Director of International Operations at the National Office in Washington, D.C.

for payment of the tax on the income received during the period thus terminated. The provision explicitly renders the taxes "immediately due and payable," as they ordinarily would be on the last day for filing a return and paying the tax for the full year.

Section 6851(b) permits the Commissioner to reopen the terminated taxable period each time the taxpayer is found to have received income during the current taxable year. Similarly, the taxpayer may reopen the terminated period if he files a "true and accurate return" for the terminated taxable period. Finally, under Section 6851(c), the taxpayer can avoid collection by furnishing a bond to insure his timely making of returns and his payment of the taxes assessed against him.

As we have already noted, Section 6851 is intended to enable the Commissioner to thwart attempts by a taxpayer to place his property beyond the reach of the tax collector before the end of the taxable year. But Section 6851, standing alone, is not sufficient to effect collection because it does not contain its own assessment authority. Hence, once the Commissioner terminates a taxable year, administrative collection of the amount determined to be "immediately due and payable" is achieved by means of other statutory authority which begins with the making of an assessment.

The assessment authority is set forth in Section 6201, Appendix A, *infra*, pp. 53–54, which empowers the Commissioner "to make the * * * assessments of all taxes * * *" without regard to whether a "deficiency" exists. These assessments are made simply by

recording the liability of the taxpayer in the books of account of the Internal Revenue Service. See Section 6203. Once the assessment is made, the Commissioner can invoke Section 6321 of the Code, which provides that if the taxpayer neglects or refuses to pay the tax, the amount shall be a lien in favor of the United States. This lien can be enforced or the tax can otherwise be collected by exercise of the Commissioner's levy and distraint power under Section 6331, Appendix A, *infra*, pp. 57–58.

For purposes of these cases, the most significant aspect of the entire process of termination of a taxable year under Section 6851 and the collection of the amount due is that nowhere in any of the pertinent statutory provisions is there an authorization or a requirement that the Commissioner issue a notice of deficiency to the taxpayer. Once taxes are made immediately due and payable by terminating a taxable year, the Commissioner may exercise his general assessment authority and proceed immediately to collect the tax through lien, levy, and distraint. At no point during this process, however, is there even the faintest statutory suggestion that a notice of deficiency should issue. Indeed, the very term "deficiency" is notably absent from Section 6851.

b. Although Section 6851 does not provide for the issuance of a notice of deficiency, there is another statutory mechanism designed to achieve collection under exigent circumstances which does provide for the issuance of such a notice. Section 6861(a), Appendix A, *infra*, pp. 62–63, provides that if the Commissioner believes "that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized

by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency * * *." Section 6861(b), in turn, states that if a taxpayer is subject to a jeopardy assessment prior to the issuance of a notice of deficiency, then the Commissioner must send such a notice within 60 days after making the assessment.

Contrary to Section 6851, which permits terminating a taxable year at any time, Section 6861 can be invoked only after the date upon which the taxes for a full taxable year are due to be paid, *i.e.*, after April 15 of the following year. Simply put, Section 6851 advances the time when taxes become payable, while Section 6861 advances the time for the collection of taxes that are already overdue. Thus, Section 6861 enables the Commissioner to avoid the delay inherent in the normal process under which he would issue a notice of deficiency under Section 6212(a) and the taxpayer might file a petition in the Tax Court and thereby stay collection under Section 6213(a). Because this process might well consume a considerable length of time, the amount of taxes at issue could be rendered uncollectible after they were ultimately determined to be due and owing.

In contrast to Section 6851, Section 6861(a) contains the term "deficiency", coupled with a specific reference to its definition in Section 6211. Consistent with these references to "deficiency" in Section 6861 is the single exception to Section 6861 in Section 6213(a) for cases subject to the jurisdiction of the Tax Court, which confirms the fact that such assessments are reviewable in the Tax Court. A comparison

of Section 6851 and 6861 indicates that Congress well knew how to require the issuance of a notice of deficiency when it so desired. Thus, the absence of such a requirement in Section 6851 is persuasive evidence that Congress did not intend to require a notice of deficiency in connection with the termination of a taxable year. Moreover, if terminated period assessments were similarly reviewable, one would suppose that Section 6213(a) would have contained a reference to Section 6851.

The courts which have held that the Commissioner must issue a notice of deficiency under Section 6851 have relied in part upon the existence of such a requirement in Section 6861. But as we shall demonstrate, *infra*, the issuance of a notice of deficiency to a taxpayer subject to a Section 6861 assessment where collection is jeopardized by delay is entirely consistent with its issuance in the usual type of full-year determinations, which cannot be assimilated to a Section 6851 termination. As a result, the deficiency notice requirement of Section 6861 should not be judicially incorporated into Section 6851.

While Section 6861 states that the Secretary or his delegate "shall * * * assess" after concluding that delay would endanger the revenue, the provision does not contain its own assessment authority. The phrase "shall assess" or its equivalent is employed in numerous provisions which do not purport to confer authority to assess. See, *e.g.*, Sections 6501, 6659, 6671, 6673, 6862, 6871, and 6901. But only Section 6201 specifically provides that "[t]he Secretary or his delegate is authorized and required to make * * * assessments of all taxes * * *." Thus, the power to make an assess-

ment after a finding of jeopardy, as in the case of a Section 6851 termination, likewise derives from Section 6201, the sole statutory authority for assessments. *Irving* v. *Gray, supra,* 479 F. 2d at 24.

c. The terms of the Code unambiguously provide that Section 6861 is the single exception to the general rule of suspension of collection while a case is pending in the Tax Court. Since Section 6861(a) is an exception to this rule of Section 6213(a), it follows that Section 6861(b) would require the Commissioner to send a notice of deficiency to a taxpayer subject to a jeopardy assessment. Apart from the danger of delay in collection, a Section 6861 taxpayer is in all respects identical to any other taxpayer subject to a determination that an amount for a particular full taxable year is owing. Thus, after having provided in Section 6861(a) that collection can proceed in such a case even though the taxpayer may invoke the jurisdiction of the Tax Court, there was no reason to preclude the operation of the otherwise applicable process of the issuance of the notice of deficiency and the filing of a Tax Court petition. Under these circumstances, the Tax Court does not play its usual role as a forum where a tax dispute can be litigated prior to payment, because collection will have already occurred under the advanced jeopardy assessment timetable.

Unlike the Section 6861 taxpayer, however, a taxpayer whose taxable year is terminated under Section 6851 cannot be assimilated to one who is subject to the usual type of deficiency determination for a full taxable year. Pursuant to Section 6851(b), a terminated period can be reopened by the Commissioner

each time he finds the taxpayer to have received additional income within the current taxable year. After such reopening, the Commissioner may enlarge the terminated period by again terminating the year at a later point in time. See Treasury Regulations, Section 1.6851–1(b)(1). Similarly, the taxpayer may reopen the terminated period if he files "a true and accurate return * * * for such taxable period." See Section 6851(b).

This is as it should be because subsequent events during the taxable year would, in almost all cases, modify the amount originally made "immediately due and payable" for the terminated period. Thus, in marked contrast to a deficiency for a full taxable year which Section 6212(c) generally provides cannot be increased once the taxpayer files a Tax Court petition,[12] the liability determined pursuant to a Section 6851 termination is tentative in character, insofar as it can be changed by both tax collector and taxpayer alike.

Under these circumstances, the tax determined to be "immediately due and payable" pursuant to a Section 6851 termination cannot be the basis for invoking the jurisdiction of the Tax Court when it is subject to continual revision throughout the remainder of the full taxable year. It seems highly inappropriate

[12] However, the Commissioner is permitted to raise an additional deficiency in his answer in the Tax Court, which has jurisdiction "to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer * * *." Section 6214(a) of the Code.

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to permit Tax Court review of an assessment for a terminated period when a reopening of the period might well cause that court's jurisdiction to lapse. As the Tax Court itself has observed in consistently refusing to exercise its jurisdiction over such terminated periods, a Section 6851 termination merely results in a "provisional statement of the amount which must be presently paid as a protection against the impossibility of collection." *Ludwig Littauer & Co.* v. *Commissioner,* 37 B.T.A. 840, 842. See also *Puritan Church—The Church of America* v. *Commissioner,* 10 T.C.M. 485, 494, affirmed *per curiam,* 209 F. 2d 306 (C.A.D.C.), certiorari denied, 347 U.S. 975; and *Page* v. *Commissioner,* 297 F. 2d 733 (C.A. 8).[13]

Finally, this uniform view of the Tax Court finds further confirmation in the understanding of those charged with the administration of these statutes. We are advised by the Internal Revenue Service that every edition of the Internal Revenue Manual for revenue agents since its inception in 1953 has provided that a notice of deficiency is not to be issued in connection with the termination of a taxable year. Since the issue in these cases involves the proper procedure to be followed by the Service in the exercise of its termination power, the Commissioner's instructions in this regard are entitled to great weight. See *United States* v. *Correll,* 389 U.S. 299, 306–307.

[13] See also *DaBoul* v. *Commissioner,* T.C. No. 287–69 (order dismissing petition for lack of jurisdiction, entered June 19, 1969), appeal dismissed *per curiam,* 429 F. 2d 38 (C.A. 9); *Riley* v. *Commissioner,* 32 T.C.M. 847 (decided August 20, 1973); *Musso* v. *Commissioner,* 32 T.C.M. 849 (decided August 20, 1973), appeal pending (C.A. 5—No. 73-3916).

In light of the above analysis, we think it clear that Sections 6851 and 6861 are separate and distinct statutory provisions the terms of which are not freely transferable from one to another. Thus, the requirement that the Commissioner issue a notice of deficiency no later than 60 days from the making of an assessment under Section 6861 has no significance for purposes of Section 6851. That termination provision, as we shall now demonstrate, antedated the establishment of the Tax Court and the concomitant definition of a deficiency over which that court has been given jurisdiction as a non-prepayment forum. Thus, the Tax Court was never intended to adjudicate the correctness of the tentative emergency assessments made in connection with the termination of a taxable year.

2. The legislative history demonstrates that Sections 6851 and 6861 are independent provisions and that an assessment pursuant to a termination of a taxable year does not give rise to a "deficiency"

a. The foregoing analysis of the statutory text and structure showing that a notice of deficiency is not required when the Commissioner terminates a taxable year under Section 6851 is confirmed by the pertinent legislative history. The following detailed description of the evolution of Sections 6851 and 6861 and their relation to the establishment of the Board of Tax Appeals demonstrate two propositions: (1) that Sections 6851 and 6861 are independent provisions so that the

assessment authority for terminations under Section 6851 does not derive from Section 6861, and (2) that the tentative assessments made as a result of the termination of a taxable year were never intended to be appealable to the Board or to its successor, the Tax Court.

(1) *The Revenue Act of 1918.* The statutory predecessor of Section 6851 was Section 250(g) of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Like its virtually identical present counterpart in Section 6851(a) of the 1954 Code, Section 250(g) empowered the Commissioner to terminate a taxpayer's taxable year when he found that the taxpayer designed to defeat the payment of his subsequently due taxes by concealment of assets or departure from the United States.[14] Once the taxable year was so terminated, the assessment of the amount determined to be due was made under Section 3182 of the Revised Statutes, the general statutory authority for assessment of internal revenue taxes.[15]

[14] Section 250(g) of the Revenue Act of 1918 also authorized the Commissioner to demand the tax for the preceding taxable year or so much of such tax as remained unpaid "whether or not the time otherwise allowed by law for filing return and paying the tax has expired * * *." This statutory power has been carried forward in Section 6851(a) of the Internal Revenue Code of 1954. The practical significance of this aspect of the termination power is to allow the Commissioner to demand payment during the period between the end of a taxable year (*e.g.*, December 31st) and the date when the return for that year is due (April 15). See *Irving* v. *Gray*, 479 F. 2d 20 (C.A. 2).

[15] Both the Fifth Circuit in *Clark* v. *Campbell*, 501 F. 2d 108, and the district court in *Schreck* v. *United States*, 301 F. Supp. 1265 (D. Md.), erroneously assumed that the assessment authority for a Section 250(g) termination was under Section 3176 of the Revised Statutes. But that provision by its terms only applied to those instances when a taxpayer refused or failed to make a required return or filed a false or fraudulent return. Section 3182, however, set forth the general authority under which internal revenue taxes were assessed. See *Calkins* v. *Smietanka*, 240 Fed. 138 (E.D. Ill.).

At the time of the enactment of Section 250(g), an individual on a calendar year basis was required to file his return on or before March 15. The tax could be paid either in four equal installments with the first payment due on the date fixed for filing the return or could be paid in full on the date prescribed for filing the return. If any part of the tax remained unpaid after the date when it was due and for ten days after notice and demand, an additional assessment was made and the taxpayer was required to pay the additional tax unless he filed a claim for abatement of the assessment. See Revenue Act of 1918, Sections 227(a) and 250(a) and (e). Judicial review of the assessment could only be obtained after payment of the disputed amount by way of a refund suit in the district court or the Court of Claims under Section 3226 of the Revised Statutes, which was first enacted as Section 19 of the Revenue Act of July 13, 1866, c. 184, 14 Stat. 98, 152. See 28 U.S.C. 1346 (a)(1).

(2) *The Revenue Act of 1921.* The evolution of the provision applicable where the Commissioner believes that collection would be jeopardized by delay, now set forth in Section 6861, proceeded independently of the termination power. Its earliest statutory predecessor was enacted as the final proviso to Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, Ap-

pendix B, *infra*, pp. 69–71,[16] and was intended to exclude one type of case from the operation of administrative appeal procedure created by that Revenue Act.

Under Section 250(d), an administrative appeal procedure was established for the resolution of taxpayer disputes with what was then called the Bureau of Internal Revenue. If an examination of a return yielded a "deficiency," which the second paragraph of Section 250(b) defined as the difference between the amount paid and "that which should have been paid" (Appendix B, *infra*, p. 68),[17] then the taxpayer was to be given a notice and a period of not less than thirty days in which to file an administrative appeal. Prior to a final decision on the taxpayer's appeal, no assessment could be made.

However, the final proviso of Section 250(d), the antecedent of present Section 6861, provided as follows: "That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing." Thus, the sole purpose of the statutory predecessor to Section 6861 was to eliminate the delay of the newly-established adminis-

[16] Because of the importance of Section 250 of the Revenue Act of 1921 to the legislative history bearing on the question presented, we have set it forth in its entirety in Appendix B, *infra*, pp. 67–74.

[17] If the Commissioner rendered an adverse decision on the taxpayer's appeal, the deficiency was assessed and the additional tax was required to be paid within ten days after notice and demand for payment.

trative appeal procedure when it was necessary to protect the revenue in situations such as the impending insolvency of the taxpayer and the existence of potentially competing claims of other creditors. However, the proviso did not grant assessment authority since that authority continued to be provided only by Section 3182 of the Revised Statutes.

Significantly, the administrative appeal procedure created by Section 250(d) of the Revenue Act of 1921 was not available to a taxpayer subject to an assessment made after the termination of his taxable year. The structure of Section 250 of the Revenue Act of 1921 so demonstrates since the Commissioner's termination power was carried forward separately in subsection (g) of Section 250 with no reference to the administrative appeal described in subsection (d). See S. Rep. No. 275, 67th Cong., 1st Sess., pp. 20–21. Indeed, the fact that Section 250(d) stated that the administrative appeal was to follow the "examination of a return" strongly indicates that the termination of a taxable year, which does not occur after the examination of any return, could not be appealed by the taxpayer under the new procedure.

(3) *The Revenue Act of 1924.* Although administrative review of deficiency determinations provided some means of resolving controversies between taxpayers and the Bureau of Internal Revenue, the impartiality of the procedure was limited by the fact that it was conducted by Bureau employees. As a result, in 1924 Congress established the Board of Tax Appeals (now the United States Tax Court) in which

a taxpayer prior to payment could obtain an independent review of his tax liabilities if the Commissioner disagreed with the amount of taxes reported. See Section 900, Revenue Act of 1924, c. 234, 43 Stat. 253; H. Rep. No. 179, 68th Cong., 1st Sess., pp. 7–8.

When the Board of Tax Appeals was created, however, it was given only limited jurisdiction. Pursuant to Section 900(e) of the Revenue Act of 1924, the Board was authorized to hear and determine only appeals filed under: (1) Section 274 (relating to deficiencies in income taxes); (2) Section 279 (relating to claims for abatement of deficiencies assessed under Section 274(d)); (3) Section 308 (relating to deficiencies in estate taxes);[18] and (4) Section 312 (relating to claims for the abatement of estate taxes assessed under Section 308(d)).[19] The Board was not authorized to entertain appeals from the Commissioner's determination that taxes were immediately due and payable, in connection with the termination of a taxable year under Section 282 of the 1924 Act. Thus, the only means by which a taxpayer whose tax evasion designs had caused the Commissioner to terminate his normal taxable year could avoid immed-

[18] Section 308 of the Revenue Act of 1924 contained provisions with respect to deficiencies in estate taxes which were generally analogous to the provisions of Section 274 pertaining to deficiencies in income taxes. Section 324 of the 1924 Act made assessment, collection, and payment of gift taxes subject to the same general provisions as the estate tax.

[19] Sections 308(d) and 312 of the Revenue Act of 1924 were applicable to jeopardy assessments of estate taxes and corresponded generally to Sections 274(d) and 279, dealing with jeopardy assessments with respect to income taxes.

iate collection was to furnish security that he would make a timely return and pay the tax when it would otherwise be due. See Section 282 (b) and (c) of the Revenue Act of 1924.[20]

The 1924 Act introduced a more precise definition of the term "deficiency" which is virtually identical to that present definition in Section 6211(a) of the 1954 Code, Appendix A, *infra,* p. 55. Insofar as it pertained to income taxes, Section 273(1) of that Act defined "deficiency" as "[t]he amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed * * * as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax * * *." Section 273(2) set forth a similar definition for the case where "no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer * * *."[21]

The reasons for these changes are explained by the committee reports (H. Rep. No. 179, 68th Cong., 1st Sess., p. 24; S. Rep. No. 398, 68th Cong., 1st Sess., p. 30) accompanying the legislation, as follows:

[20] Corresponding security provisions had been provided in Section 250(g) of both the 1918 and 1921 Acts.

[21] Paragraphs (1) and (2) of Section 273 of the 1924 Act have been merged in Section 6211(a) of the 1954 Code, the present statutory definition of a deficiency. It speaks of "the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon." See also Treasury Regulations, Section 301.6211–1.

> The term "deficiency" is here defined. Under the existing law (section 250(b), second paragraph), the term "deficiency" is not defined with exactness. Under the proposed provisions, credits and refunds for each year will be considered in the determination of a deficiency for that particular year. The proposed definition of "deficiency" also includes amounts of tax found by the Commissioner to be due on returns prepared or approved by him under section 3176, Revised Statutes, in cases in which a person, association, or corporation has failed to make a return or has made a false or fraudulent return. Such amounts are not included in the definition in the existing law, although it is clear that they are properly termed a "deficiency." The inclusion of these amounts within the term "deficiency" will permit the taxpayer to appeal from the determination of the Commissioner in such cases to the Board of Tax Appeals, and will enable the collection of interest upon amounts found to be due.

There are two indications in the above-quoted committee report that the term "deficiency" was not intended to cover the amount assessed after a Section 6851 termination. If a taxpayer filed a full year return and the Commissioner determined a "deficiency", that determination could only have occurred after the close of the normal taxable year. But in discussing the possibility that the taxpayer might not file a return, Congress observed that the Commissioner had the power to make a return for such a delinquent taxpayer under Section 3176 of the Revised Statutes. That provision, now carried forward as Section 6020(b) of the 1954

Code, only applied to the case where the taxpayer failed to file a return "at the time prescribed" by "law or regulation." No such return was required to be filed by a taxpayer subjected to a Section 6851 termination at a particular time prescribed by the Code or Regulations. Thus, the Commissioner's power to make a return for a delinquent taxpayer could only be exercised after the close of the normal taxable year.

Secondly, the final reference by the committee to interest upon an amount due also excludes a Section 6851 termination. Interest on underpayments only runs from the "last date prescribed for payment," *viz.*, the due date of the full year return, which again can only occur after the close of the taxable year. See Section 6601(a) of the 1954 Code;[22] Treasury Regulations, Section 301.6601–1(c)(3). But there is no interest imposed upon an amount assessed after a Section 6851 termination because that amount is not due to be paid on the "last date prescribed for payment."

Accordingly, the Congressional understanding of the definition of "deficiency" demonstrates that it was not intended to encompass the amount which becomes "immediately due and payable" upon the termination of a taxable year.

Finally, the exception to the administrative appeal under the 1921 Act for cases where collection would be jeopardized by delay was carried forward in the independent Board of Tax Appeals review created by the 1924 Act. If the Commissioner determined that

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[22] A similar rule regarding interest was embodied in Section 274(b) of the 1924 Act.

the taxpayer had reported less tax than was due he was required to mail to the taxpayer a notice of the proposed deficiency. Within 60 days of the mailing of the notice the taxpayer could file an appeal with the Board of Tax Appeals, and no part of the deficiency could normally be assessed until after a final decision by the Board. Revenue Act of 1924, Section 274 (a) and (b).[23]

However, just as the prior administrative appeal procedure was not permitted to delay assessment or collection when the revenue was in jeopardy, so Section 274(d) of the 1924 Act required the Commissioner immediately to assess the deficiency and to give notice and demand for payment of the taxes, whether or not he had previously given notice of the deficiency or whether the taxpayer had filed an appeal with the Board of Tax Appeals. Under Section 279 (a) and (b) of the Revenue Act of 1924, a taxpayer who had been subjected to an assessment of a deficiency where collection was in jeopardy had ten days within which he could file a claim in abatement, which had to be accompanied by a bond in an amount and with such sureties that the Commissioner deemed necessary to protect the revenue.

If the taxpayer did not file such a claim, the Commissioner could collect the deficiency. If the claim was

[23] Section 274(b) of the 1924 Act provided that if the Board agreed with the Commissioner's determination of the deficiency it could be assessed without further delay. However, if the Board found that there was no deficiency then an assessment was barred, but the Commissioner could, within a period of one year after the Board's decision, bring an action in the district court to collect the deficiency.

filed and disallowed by the Commissioner, the taxpayer could, within 60 days of the notice of disallowance, file an appeal with the Board.[24] Nevertheless, collection would proceed while the case was pending before the Board.

(4) *The Revenue Act of 1926.* The basic jurisdiction of the Board of Tax Appeals remained unchanged through the enactment of the Revenue Act of 1926, c. 27, 44 Stat. 9.[25] That jurisdiction continued

[24] If the appeal was allowed by the Board, the Commissioner was required to abate the assessment. However, he was permitted, within a period of one year after the decision of the Board, to bring an action in the district court to collect the deficiency. See Section 279(b) of the Revenue Act of 1924.

[25] There was, however, one change effected by the 1926 Act concerning the ability of the Board of Tax Appeals to reach a final decision in those types of cases committed to its jurisdiction. While prior revenue acts had permitted the Commissioner to bring an action in the district court to collect a deficiency even where the Board had held that there was no deficiency, Section 1001(a) of the 1926 Act eliminated recourse to the district courts by providing for direct appeal from the Board to the circuit courts of appeals.

The 1926 Act did enlarge the original jurisdiction of the Board of Tax Appeals to consider deficiencies beyond those shown in the Commissioner's notice, provided that he made his additional claim known at or before the hearing on the notice. See Section 274(e). Cf. Section 6214(a) of the 1954 Code. In addition, the Board was given jurisdiction to determine that the taxpayer not only did not owe the taxes shown in the Commissioner's notice, but had overpaid. See Section 284(e). Cf. Section 6512(b) of the 1954 Code.

The 1926 Act also eliminated the gift tax that had been imposed under the Revenue Act of 1924. But the gift tax was reimposed by the Revenue Act of 1932, and gift tax deficiencies have at all times since then been subject to redetermination by the Board of Tax Appeals (now the Tax Court). See Section 501, *et seq.*, of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Section 2501, *et seq.*, of the 1954 Code.

to be limited to the redetermination of deficiencies in income or estate taxes. Moreover, the definition of "deficiency" was carried forward in identical form from Section 273 of the 1924 Act to the same numbered section of the 1926 Act. Thus, the taxpayer whose taxable year was terminated still could not appeal to the Board. As had been provided by the prior revenue acts, he could avoid immediate collection of the tax only by providing the security permitted to be furnished under the termination provision itself. See Section 285(b) and (c) of the 1926 Act.

While the 1926 Act did not alter the Commissioner's termination power or permit Tax Court review of its exercise, it did somewhat enlarge the rights of a taxpayer subject to an asessment where the Commissioner believed that delay would jeopardize collection.[36] Unlike the procedure outlined by the 1924 Act, a taxpayer against whom a jeopardy assessment was made was no longer required to file a claim in abatement (together with a bond) if he wished to have the deficiency redetermined by the Board. Under the 1926 Act, such a taxpayer could have the deficiency redetermined whether or not he furnished a bond because Section 279(b) required the Commissioner to issue a notice of deficiency within 60 days of the making of the jeopardy assessment, if he had not already done so. However, the taxpayer was still required to post a bond within ten days of the jeopardy assessment. See Section 279(f) of the 1926 Act.

[36] The jeopardy assessment provision was carried forward as Section 279(a) of the 1926 Act.

(5) *The 1954 Code.* Two final changes to these statutory provisions were made at the time of the 1954 codification.[37] Neither of these changes, however, altered the jurisdictional framework of the Tax Court.[38]

First, the termination provision was amended by the addition of subsection (b) to Section 6851, providing for the reopening of a terminated taxable period. This provision permitted the Commissioner to reopen a terminated period where the taxpayer received additional income during the current taxable year. Similarly, the taxpayer could reopen the terminated period upon the filing of a true and accurate

[37] From 1928 through the adoption of the Internal Revenue Code of 1939, there were no significant changes to the termination or jeopardy assessment provisions or to the jurisdiction of the Board of Tax Appeals. See Sections 147, 271–273 of the Revenue Act of 1928, c. 852, 45 Stat. 791; Sections 146, 271–273 of the Revenue Act of 1932, c. 209, 47 Stat. 169; Sections 146, 271–273 of the Revenue Act of 1934, c. 277, 48 Stat. 680; Sections 146, 271–273 of the Revenue Act of 1936, c. 690, 49 Stat. 1648; Sections 146, 271–273 of the Revenue Act of 1938, c. 289, 52 Stat. 447; and Sections 146, 271–273 of the Internal Revenue Code of 1939.

Moreover, there was no alteration to the Commissioner's assessment authority. Section 3182 of the Revised Statutes was recodified as Section 3640 of the 1939 Code. Section 3176 of the Revised Statutes, which gave the Commissioner the power to make returns for taxpayers who failed to file or who filed fraudulent returns and to make assessments in such cases, was carried forward to Sections 3612 (making of returns) and 3640 (assessment authority) of the 1939 Code. The Commissioner's power to make returns for delinquent taxpayers is now set forth in Section 6020(b) of the 1954 Code.

[38] The basic assessment authority remained unchanged at the time of the 1954 codification. The general assessment provision contained in Section 3640 of the 1939 Code was re-enacted as Section 6201(a) of the 1954 Code.

return for the full year. See Treasury Regulations, Section 1.6851–1(b) and (c); H. Rep. No. 1337, 83d Cong., 2d Sess., p. A421; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 597.

Secondly, Section 6863(b)(3), Appendix A, *infra*, pp. 63–65, was added to the 1954 Code by the Senate Finance Committee. It provides that where the Commissioner makes an early jeopardy assessment of a deficiency under Section 6861 and seizes property in aid of collection, the sale of the property (with certain exceptions) will be stayed during the period within which the Tax Court (formerly the Board of Tax Appeals) might retain, or obtain, jurisdiction to redetermine the deficiency.[29] See S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 597–598. Significantly, no similar limitation on the Commissioner's power of sale was enacted with respect to Section 6851 terminations.[30]

b. Two points emerge from the foregoing description of the evolution of the pertinent statutory provisions which are critical to the question in these

[29] Under Section 6863(b)(3)(B) the property could be sold if the taxpayer consented to the sale, if the Commissioner determined that conservation and maintenance expenses would greatly reduce the net proceeds from the sale, or if the property was of the type described in Section 6336 (relating to perishable goods). The sale restriction was applicable only with respect to assessments made after January 1, 1955. See Section 6863(b)(3)(C).

[30] Nor did Congress provide for a stay of the sale of property seized in connection with the immediate assessment of taxes, pursuant to Section 6862 of the 1954 Code (dealing with the immediate collection of taxes other than income, estate, or gift taxes).

cases. First, contrary to *Rambo* v. *United States*, 492 F. 2d 1060 (C.A. 6), *Clark* v. *Campbell*, 501 F. 2d 108 (C.A. 5), and *Schreck* v. *United States*, 301 F. Supp. 1265, 1272–1273 (D. Md.), the assessment authority for the taxes made "immediately due and payable" under Section 6851 is not Section 6861, but Section 6201. Indeed, from 1918 to 1921, the revenue act contained only the predecessor of Section 6851 and not the predecessor of Section 6861. But even after the introduction in 1921 of the predecessor of Section 6861, its inclusion as a proviso to the administrative appeal procedure indicates that it was intended simply to provide for assessment of taxes without the necessity of awaiting the outcome of the administrative appeal where collection would be jeopardized by delay.

In short, Section 6861 provides only for an early assessment, but it is not the authority to make an assessment itself, which has always resided in the general assessment provision now set forth in Section 6201 of the 1954 Code. Thus, the Commissioner's power to terminate a taxable year under Section 6851 and subsequently to assess under Section 6201 is not dependent upon Section 6861.[31] There is accordingly no statutory basis for the incorporation of the notice

[31] The independence of Sections 6851 and 6861 from each other is further demonstrated by the fact that they have different provisions for furnishing a bond. See Sections 6851(e) and Section 6863(a). Under the latter bond provision applicable to jeopardy assessments, the sale of property seized by the Service may be stayed pending a Tax Court decision. However, the sale of seized property cannot be stayed when the collection action is pursuant to a Section 6851 termination. See p. 40, *supra*.

of deficiency requirement of Section 6861(b) into Section 6851.[32]

Secondly, the legislative evolution of Sections 6851 and 6861 and the creation of the Board of Tax Appeals demonstrate that the amount assessed pursuant to a Section 6851 termination is not a "deficiency" within the meaning of Section 6211. The key to an understanding of the term "deficiency" lies in the 1921 Act. That Act established the administrative appeal which was the precursor of the independent review of the Board of Tax Appeals. For purposes of that procedure, Section 250(b) of that Act defined "deficiency" as the difference between "the amount already paid * * * [and] that which should have been paid." At the time of termination, however, neither the Commissioner nor the taxpayer would be able to specify "[the tax] which should have been paid" because no tax was required to have been paid at that time. Since the difference between the tax paid and the tax that should have been paid could only be determined after the close of the normal taxable year, the deficiency concept was simply inapplicable to an assessment made for a terminated taxable period. It would therefore follow that no notice of deficiency would have had to be issued for a terminated period and that the administrative appeal established under the 1921 Act would not have been available to review such an assessment.

[32] In holding that Section 6861 provides the assessment authority for Section 6851, the Sixth Circuit in *Rambo* v. *United States*, *supra*, 492 F. 2d at 1064, concluded that "it is reasonable that Congress intended that the next succeeding section in the code (Sec. 6861), entitled 'Jeopardy Assessments,' should provide that authority." But this type of reasoning is explicitly foreclosed by Section 7806(b), which provides that no inference is to be drawn from the location of a particular section or any part of a descriptive title. That provision was first enacted as Section 6 of the Act of February 10, 1939, 53, Stat. 1, 2, which codified the 1939 Internal Revenue Code.

Similarly, petitioner Laing cannot rely (Br. 10–11) upon the cross-reference provisions of Sections 6201(d) and 6216. Section 7806(a) provides that such cross-references "where the word 'see' is used, are made only for convenience, and shall be given no legal effect."

The same analysis is fully applicable to the definition of "deficiency" under the 1954 Code. Section 6211(a), which defines "deficiency" in essentially identical terms to those in Section 273 of the 1924 Act, generally speaks of the amount by which the tax imposed by subtitles A and B, or chapter 42,[33] exceeds "the amount shown as the tax by the taxpayer upon his return [and paid], if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon * * *." As our discussion of the legislative history of Section 273 of the 1924 Act (*supra*, pp. 33–35) pointed out, there are two possibilities contemplated by this definition--the taxpayer either has filed a return at the prescribed time or he has not. If he has filed a return, he has done so after the close of the normal taxable year, so that the definition of "deficiency"' would not cover te Section 6851 termination.

The possibility that the taxpayer has not filed a return cannot refer to a Section 6851 termination when the due date for filing an annual return has not

[33] Subtitles A and B, and chapter 42, refer respectively to the income tax, the estate and gift tax, and the excise tax upon private foundations.

passed. The Commissioner's power to make a return for a delinquent taxpayer under Section 6020(b) of the Code is limited to the case where the taxpayer has not filed a return "at the time prescribed" by "law or regulation." There is, however, no prescribed due date for a short-year return to be filed by a taxpayer subject to a Section 6851 termination. Moreover, prior to the end of the year, neither the Commissioner nor the taxpayer will be able to ascertain the "tax imposed" by Section 1 of the Code because that computation requires knowledge of the taxable income of a full year with respect to which the graduated tax rates are applied.[34] *Irving* v. *Gray, supra,* 479 F. 2d at 24; *Williamson* v. *United States, supra,* 31 A.F.T.R. 2d 73–800 (C.A. 7) (unreported order of April 8, 1971). As a result, the implicit reference in Section 6211 to a situation where the taxpayer does not file a return can only refer to the case where he has not filed a return as of the prescribed due date, *i.e.*, after the close of the normal taxable year.[35] Thus, under both possibilities contemplated by Section 6211 (a), a "deficiency" can be determined only after the

[34] Indeed, if the amount assessed upon termination were a "deficiency", the splitting up of a single taxable year into a number of short terminated periods could result in a lower overall tax liability because of the graduated rates imposed by Section 1 of the Code. The purpose of Section 6851(b), the reopening mechanism, is to avoid this problem. See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A421; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 597.

[35] In concluding that a taxpayer subject to a Section 6851 termination is required to file a short-period return so that the failure to do so would be covered by Section 6211(a), both the Sixth Circuit in *Rambo* v. *United States, supra,* 492 F. 2d at

close of a complete taxable year. The requirement that the Commissioner issue a notice of deficiency does not, therefore, apply to the Section 6851 termination of a taxable year prior to its normal conclusion.[36] Accordingly, such terminations are not reviewable in the Tax Court, for that court requires the determination of a "deficiency" before its jurisdiction can be invoked.

1064, and the Fifth Circuit in *Clark* v. *Campbell, supra,* 501 F. 2d at 117, n. 27, relied upon Section 443(a)(3) of the 1954 Code. That section provides that a short-period return "shall be made * * * [w]hen the Secretary or his delegate terminates the taxpayer's taxable year under section 6851."

While the language of Section 443(a)(3) requires the filing of a return for the terminated period, there are no further legislative or regulatory directions or requirements as to how or when such a return is to be filed. Treasury Regulations, Section 1.443–1(a)(3) refers only to Section 1.6851–1. Under the latter provision, the only reference to a return is with respect to the full year return that must be filed on or before April 15, pursuant to Sections 6012 and 6072. Hence, the filing of a short-period return does not appear to be explicitly prescribed by the Code in the same manner as a full-year return. Indeed, the fact that the taxpayers in these cases did not file such returns suggests that the requirement is not well understood. Nor does the Code impose any civil or criminal penalty for the failure to file such a short-period return. But whether or not such a terminated period return is required to be filed, the "tax imposed" by Section 1 of the Code could not be determined until the end of the full taxable year, for which a return must be filed on or before April 15. Thus, there could be no "deficiency" within the meaning of Section 6211(a) until that time.

[36] In holding that the amount determined to be immediately due and payable under Section 6851 is a "deficiency", the district court in *Schreck* v. *United States, supra,* 301 F. Supp. at 1275, relied upon the Regulations under Section 273 of the 1926 Act. They provided that where the taxpayer failed to make a return "the deficiency is the * * * correct amount of the tax." Treas-

C. THE SUMMARY COLLECTION OF INCOME TAXES DETERMINED TO BE DUE UNDER SECTION 6851 WITHOUT A NOTICE OF DEFICIENCY POSES NO CONSTITUTIONAL PROBLEMS

Although the question whether the Commissioner is required to issue a notice of deficiency in connection with a Section 6851 termination of a taxable year is statutory in character, the courts that have imposed such a requirement have suggested that a contrary result would produce "significant constitutional problems." *Rambo* v. *United States, supra,* 492 F. 2d at 1064–1065. See also *Schreck* v. *United States, supra,* 301 F. Supp. at 1281. The constitutional reservations expressed by these courts were prompted by their concern that if the Commissioner were not required to issue a notice of deficiency in these circumstances, the taxpayer could not gain immediate access to the Tax Court to review the Commissioner's determination.

It is true that the jurisdiction of the Tax Court to determine liability prior to payment is predicated on the existence of a "deficiency" within the meaning of Section 6211(a) and the Commissioner's issuance

ury Regulations 69 (1926 Rev. Act.), Art. 1231. But that regulation assumed that the taxpayer was obligated to make a return at a prescribed time and failed to do so, a possibility that could only occur after the close of the taxable year. Similarly, the Sixth Circuit in *Rambo* v. *United States, supra,* 492 F. 2d at 1064, erroneously assumed that the reference in Treasury Regulations, Section 301.6211–1 (a) to the situation where a taxpayer fails to file a return includes such a failure after the termination of a taxable year. But, like its earlier counterparts, this regulation does not mention a Section 6851 termination. In light of the legislative history of the definition of a deficiency, there is no basis for construing the regulation to include a termination of a taxable year.

of a notice of deficiency under Section 6212(a). As a result, a notice of deficiency has been described as "[a] ticket to the tax court." *Corbett* v. *Frank,* 293 F. 2d 501, 502 (C.A. 9). See also *Mason* v. *Commissioner,* 210 F. 2d 388 (C.A. 5). But that lack of immediate access to the Tax Court by the taxpayers in these cases does not mean they are without any effective judicial remedy to challenge the Commissioner's action. To the extent that the courts have regarded Tax Court review as the exclusive remedy, and intimated that there would be constitutional problems raised by the absence of such review, they are in error.

We think it clear that taxpayers subject to a Section 6851 termination have access to the district courts or the Court of Claims through a refund suit. As the court below in *Laing,* No. 73–1808, observed, once the Service has seized any of the taxpayer's property in satisfaction of the assessment, the taxpayer subject to a Section 6851 termination has the right "at any time" (Pet. App. A 17) to file a claim for refund for the short period either by making a short-period return and showing an amount due less than the amount seized or by filing a formal claim for refund (Form 843). See *Rogan* v. *Mertens,* 153 F. 2d 937 (C.A. 9). See also Treasury Regulations, Section 301.6402–3(a)(1). While the Commissioner has six months to process such a claim before the taxpayer can institute suit (see Sections 6532(a) and 7422(a) of the 1954 Code), refund claims are often acted upon in far less time.[37]

[37] For example, in No. 73–1808, petitioner Laing filed a refund claim on March 1, 1973 which was denied only eight days later on March 9, 1973 (see Brief for the Petitioner in No. 73–1808, p. 34, n. 11).

If the claim is denied, the taxpayer may immediately commence suit in the district court or the Court of Claims, both of which have jurisdiction to consider "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws" (28 U.S.C. 1346(a)(1)). This broad jurisdiction of the district courts and the Court of Claims over refund suits does not, as in the case of the Tax Court, depend upon the existence of a "deficiency" within the meaning of the Code. Moreover, there is no particular advantage to the taxpayer in Tax Court review of these termination cases.

Alternatively, a taxpayer subject to a Section 6851 termination may await the end of the full taxable year and file a full year return claiming a refund. See *Irving* v. *Gray, supra,* 479 F. 2d at 24. But whether the taxpayer files a short-period or full taxable year refund claim, he will be able to sue for the refund even if the value of the property seized is less than the amount of the assessment. The rule of *Flora* v. *United States,* 357 U.S. 63, on rehearing, 362 U.S. 145, which ordinarily requires the payment of the entire deficiency as a prerequisite to a refund suit would not be applicable. The rationale of *Flora*—to prevent the blurring of the line between Tax Court and district court jurisdiction—would not govern a case where no "deficiency" has been determined. In that situation, there would be no potential Tax Court

jurisdiction to infringe upon the jurisdiction of the district court. Accord: *Irving* v. *Gray,* 479 F. 2d at 24–25, n. 6; *Lewis* v. *Sandler,* 498 F. 2d 395, 400 (C.A. 4).

Finally, the taxpayer subject to a Section 6851 termination may await the close of the normal taxable year and file a full-year tax return. Once a full-year return is filed, the Commissioner may determine that additional tax is due for the full year. In that situation, the statutory definition of a "deficiency" will be met and the Commissioner will be required to issue a notice of deficiency. The taxpayer would then be able to seek a redetermination in the Tax Court, either to contest the additional tax asserted by the Commissioner to be due, or to determine whether he has made an overpayment for the full year.

Thus, while a taxpayer whose taxable year is terminated may not gain immediate access to the Tax Court, he can seek prompt relief in the district court or the Court of Claims and may ultimately be able to petition the Tax Court for a redetermination. There is no constitutional requirement that all tax disputes be adjudicable in the Tax Court. Indeed, that court only has jurisdiction over income, estate, and gift taxes and cannot resolve disputes involving the large number of excise taxes, such as F.I.C.A., F.U.T.A., and other excise taxes. Pursuant to Section 6862 of the Code, the Commissioner can assess those types of taxes prior to the due date for their payment where he finds that their collection is in jeopardy. The

Tax Court would have no jurisdiction to review the correctness of those excise tax assessments.

In sum, the variety of remedies available to a taxpayer subject to a Section 6851 termination fully satisfies the constitutional requirements of due process. This Court in *Phillips* v. *Commissioner,* 283 U.S. 589, 595, long ago unanimously established that the taxing authorities may lawfully seize property for payment of taxes in summary administrative proceedings, prior to an adjudication of liability, where "adequate opportunity is afforded for a later judicial determination of the legal rights * * *." The rule of *Phillips* has been recently cited with approval in *Fuentes* v. *Shevin,* 407 U.S. 67, 91–92, n. 24. Cf. *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600.[38] Thus, the general principle we urge in these cases, that the Commissioner is not required to issue a notice of deficiency in connection with the Section 6851 termination of a taxable year, does not pose any constitutional problems.

[38] *Phillips* is representative of a long line of decisions upholding the right of the federal government to collect its internal revenue by means of summary administrative procedures. See, *e.g.*, *Cheatham* v. *United States*, 92 U.S. 85, 88–89, and *Springer* v. *United States*, 102 U.S. 586, 593–594. In fact, the Court's original consideration of the due process clause of the Fifth Amendment sustained the summary collection of obligations to the government, making specific reference to the summary collection of taxes. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272.

CONCLUSION

For the reasons stated, the judgment of the Sixth Circuit in No. 74–75 should be reversed and the case remanded to the district court with directions to dismiss the complaint; the judgment of the Second Circuit in No. 73–1808 should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
STUART A. SMITH,
Assistant to the Solicitor General.
ROBERT S. WATKINS,
Attorney.

DECEMBER 1974.

APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6201. ASSESSMENT AUTHORITY.

(a) *Authority of Secretary or Delegate.*—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) *Taxes shown on return.*—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

(2) *Unpaid taxes payable by stamp.*—

(A) *Omitted stamps.*—Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary or his delegate, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary or

his delegate determines to be liable for such tax.

(B) *Check or money order not duly paid.*—In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) *Erroneous income tax prepayment credits.*—If on any return or claims for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary or his delegate in the same manner as in the case of a mathematical error appearing upon the return.

(b) [as amended by Sec. 2(b), Act of August 7, 1969, P.L. 91-53, 83 Stat. 91] *Amount Not To Be Assessed.*—

(1) *Estimated income tax.*—No unpaid amount of estimated tax under section 6153 or 6154 shall be assessed.

* * * * *

(d) [as amended by Sec. 101(j)(38), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] *Deficiency Proceedings.*—

For special rules applicable to deficiencies of income, estate, gift, and chapter 42 taxes, see subchapter B.

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) [as amended by Sec. 101(f)(1), Tax Reform Act of 1969, *supra*] *In General.*—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitles A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by subtitle A or B or chapter 42 exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * * * * *

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, and Sec. 101(j)(40), Tax Reform Act of 1969, *supra*] *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 42, he is authorized to send notice of such deficiency to the tax payer by certified mail or registered mail.

* * * * *

(c) *Further Deficiency Letters Restricted.*—

(1) [as amended by Sec. 101(f)(2), Tax Reform Act of 1969, *supra*, and Sec. 102(d)(5), Excise, Estate and Gift Tax Adjustment Act of 1970, P.L. 91-614, 84 Stat. 1836] *General rule.*—

If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar quarter, of estate tax in respect of the taxable estate of the same decedent, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments).

* * * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Sec. 101(j)(42), Tax Reform Act of 1969, *supra*] *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B or chapter 42 and no levy

or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be law-

ful without regard to the 10-day period provided in this section.

(b) [as amended by Sec. 104(a), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) [as amended by Sec. 104(b)(1), Federal Tax Lien Act of 1966, *supra*] *Requirement.*—Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * * *

SEC. 6335. SALE OF SEIZED PROPERTY.

(a) *Notice of Seizure.*—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling

or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) [as amended by Sec. 104(d), Federal Tax Lien Act of 1966, *supra*] *Notice of Sale.*—The Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

* * * * *

SEC. 6511. LIMITATIONS ON CREDIT OR REFUND.

(a) [as amended by Sec. 82(a), Technical Amendments Act of 1958, *supra*] *Period of Limitation of Filing Claim.*—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax

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was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

* * * * *

SEC. 6532. PERIODS OF LIMITATION ON SUITS.

(a) *Suits by taxpayers for Refund.*—

(1) [as amended by Sec. 89(b), Technical Amendments Act of 1966, *supra*] *General rule.*—No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

* * * * *

SEC. 6851. TERMINATION OF TAXABLE YEAR.

(a) *Income Tax in Jeopardy.*—

(1) *In general.*—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year

unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

* * * * *

(b) *Reopening of Taxable Period.*—Notwithstanding the termination of the taxable period of the taxpayer by the Secretary or his delegate, as provided in subsection (a), the Secretary or his delegate may reopen such taxable period each time the taxpayer is found by the Secretary or his delegate to have received income, within the current taxable year, since a termination of the period under subsection (a). A taxable period so terminated by the Secretary or his delegate may be reopened by the taxpayer (other than a nonresident alien) if he files with the Secretary or his delegate a true and accurate return of the items of gross income and of the deductions and credits allowed under this title for such taxable

period, together with such other information as the Secretary or his delegate may by regulations prescribe. If the taxpayer is a nonesident alien the taxable period so terminated may be reopened by him if he files, or causes to be filed, with the Secretary or his delegate a true and accurate return of his total income derived from all sources within the United States, in the manner prescribed in this title.

* * * * *

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) *Authority for Making.*—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a) immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

(b) *Deficiency Letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

* * * * *

(g) *Abatement if Jeopardy Does Not Exist.*—The Secretary or his delegate may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

* * * * *

SEC. 6863. STAY OF COLLECTION OF JEOPARDY ASSESSMENTS.

(a) *Bond to Stay Collection.*—When a jeopardy assessment has been made under section 6861 or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary or his delegate, within such time as may be fixed by regulations prescribed by the Secretary or his delegate, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of the jeopardy assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of the jeopardy assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced.

(b) *Further Conditions in Case of Income, Estate, or Gift Taxes.*—In the case of taxes subject to the jurisdiction of the Tax Court—

(1) *Prior to petition to tax court.*—If the bond is given before the taxpayer has filed his petition under section 6213(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such section, then the amount, the collection of which is stayed by the bond, will be paid on notice and demand at any time after the expiration of such period, together with interest thereon from the date of the jeopardy notice and demand to the date of notice and demand under this paragraph.

(2) *Effect of tax court decision.*—The bond shall be conditioned upon the payment of so much of such assessment (collection of which is stayed by the bond) as is not abated by a decision of the Tax Court which has become final. If the Tax Court determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Tax Court is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(3) *Stay of sale of seized property pending tax court decision.*

(A) *General rule.*—Where, notwithstanding the provisions of section 6213(a), a jeopardy assessment has been made under section 6861 the property seized for the collection of the tax shall not be sold—

(i) if section 6861(b) is applicable prior to the issuance of the notice of deficiency and the expiration of the time provided in section 6213(a) for filing petition with the Tax Court, and

(ii) if petition is filed with the Tax Court (whether before or after the making of such jeopardy assessment under

section 6861), prior to the expiration of the period during which the assessment of the deficiency would be prohibited if section 6861(a) were not applicable.

(B) *Exceptions.*—Such property may be sold if—

(i) the taxpayer consents to the sale,

(ii) the Secretary or his delegate determines that the expenses or conservation and maintenance will greatly reduce the net proceeds, or

(iii) the property is of the type described in section 6336.

(C) *Applicability.*—Subparagraphs (A) and (B) shall be applicable only with respect to a jeopardy assessment made on or after January 1, 1955, and shall apply with respect to taxes imposed by this title and with respect to taxes imposed by the Internal Revenue Code of 1939.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, *supra*] *Tax.*—Except as provided in sections 6212 (a) and (c), 6213(a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceedings shall be maintained in any court for the recovery of any internal revenue tax

alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

APPENDIX B

REVENUE ACT OF 1921

PART IV.—ADMINISTRATIVE PROVISIONS.

PAYMENT OF TAXES.

SEC. 250. (a) That except as otherwise provided in this section and sections 221 and 237 the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after the time fixed by law for filing the return. Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. In any case in which the time for the payment of any installment is at the request of the taxpayer thus postponed, there shall be added as a part of such installment interest thereon at the rate of one-half of 1 per centum per month from the time it would have been due if no extension had been granted, until paid. If any installment is not paid when due, the whole amount of the tax unpaid shall become due and payable upon notice and demand by the collector.

The tax may at the option of the taxpayer be paid in a single payment instead of installments, in which case the total amount shall be paid on or before the time fixed by law for filing the return, or, where an extension of time for filing the return has been granted, on or before the expiration of the period of such extension.

(b) As soon as practicable after the return is filed the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference, to the extent not covered by any credits due to the taxpayer under section 252 (hereinafter called "deficiency"), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due (or, if paid on the installment basis, on the deficiency of each installment from the time the installment was due), shall be paid upon notice and demand by the collector. If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of 1 per centum per month on the amount of such deficiency in the tax from the time it

was due (or, if paid on the installment basis, on the amount of the deficiency in each installment from the time the installment was due), which penalty and interest shall become due and payable upon notice and demand by the collector. If any part of the deficiency is due to fraud with intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax. In such case the whole amount of the tax unpaid, including the penalty so added, shall become due and payable upon notice and demand by the collector.

(c) If the return is made pursuant to section 3176 of the Revised Statutes as amended, the amount of tax determined to be due under such return shall be paid upon notice and demand by the collector.

(d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under

this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided,* That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: *Provided further,* That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: *Provided further,* That in cases coming within the scope of paragraph (9) of subdivision (a) of section 214, or of paragraph (8) of subdivision (a) of section 234, or in cases of final settlement of losses and other deductions tentatively allowed by the Commissioner pending a determination of the exact amount deductible, the amount of tax or deficiency in tax due may be determined, assessed, and collected at any time; but prior to the assessment thereof the taxpayer shall be notified and given a period of not less than thirty days in which to file an appeal and be heard as hereinafter provided in this subdivision.

If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in

which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: *Provided,* That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing.

(c) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of a bona fide claim for abatement filed within ten days after notice and demand by the collector, where the taxpayer has not had the benefit of the provisions of subdivision (d), such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of one-half of 1 per centum per month on that part of the claim rejected.

In the case of the first installment provided for in subdivision (a) the instructions printed on the return shall be sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's compu-

tation of the tax on the return shall be sufficient notice of the amount due. In the case of each subsequent installment the collector may, within thirty days and not later than ten days before the installment becomes due, mail to the taxpayer notice of the amount of the installment and the date on which it is due for payment. Such notice of the collector shall be sufficient notice and sufficient demand under this section.

(f) In the case of any deficiency (except where the deficiency is due to negligence or to fraud with intent to evade tax) where it is shown to the satisfaction of the Commissioner that the payment of such deficiency would result in undue hardship to the taxpayer, the Commissioner may, with the approval of the Secretary, extend the time for the payment of such deficiency or any part thereof for such period not in excess of eighteen months from the passage of this Act as the Commissioner may determine. In such case the Commissioner may require the taxpayer to furnish a bond with sufficient sureties conditioned upon the payment of the deficiency in accordance with the terms of the extension granted. There shall be added in lieu of other interest provided by law, as a part of such deficiency, interest thereon at the rate of two-thirds of 1 per centum per month from the time such extension is granted; except where such other interest provided by law is in excess of interest at the rate of two-thirds of 1 per centum per month. If the deficiency or any part thereof is not paid in accordance with the terms of the extension granted, there shall be added as part of the deficiency, in lieu of other interest and penalties provided by law, the sum of 5 per centum of the deficiency and interest on the deficiency at the rate of 1 per centum per month from the time it becomes payable in accordance with the terms of such extension.

(g) If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any action or suit brought to enforce payment of taxes made due and payable by virtue of the provisions of this subdivision the finding of the Commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design. A taxpayer who is not in default in making any return or paying income, war-profits, or excess-profits tax under any Act of Congress may furnish to the United States, under regulations to be prescribed by the Commissioner with the approval of the Secretary, security approved by the Commissioner that he will duly make the return next thereafter required to be filed and pay the tax next thereafter required to be paid. The Commissioner may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of

this subdivision, provided the taxpayer has paid in full and all other income, war-profits, or excess-profits taxes due from him under any Act of Congress. If security is approved and accepted pursuant to the provisions of this subdivision and such further or other security with respect to the tax or taxes covered thereby is given as the Commissioner shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this subdivision prior to the expiration of the time otherwise allowed for paying such respective taxes. In the case of a citizen of the United States about to depart from the United States the Commissioner may, at his discretion, waive any or all of the requirements placed on the taxpayer by this subdivision. No alien shall depart from the United States unless he first secures from the collector or agent in charge a certificate that he has complied with all the obligations imposed upon him by the income, war-profits, and excess-profits tax laws. If a taxpayer violates or attempts to violate this subdivision there shall, in addition to all other penalties, be added as part of the tax 25 per centum of the total amount of the tax or deficiency in the tax, together with interest at the rate of 1 per centum per month from the time the tax became due.

(h) The provisions of subdivisions (e), (f) and (g) of this section shall apply to the assessment and collection of taxes which have accrued or may accrue under the Revenue Act of 1917, the Revenue Act of 1918 or this Act.

U. S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
JAN 16 1975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-75

UNITED STATES OF AMERICA, ET AL. - Petitioners

versus

ELIZABETH JANE HALL - - - Respondent

BRIEF FOR RESPONDENT

DONALD M. HEAVRIN
914 Republic Building
Louisville, Kentucky 40202

EDWIN F. KAGIN, JR.
1106 Citizens Plaza
Louisville, Kentucky 40202

Of Counsel:

MICHAEL GRAVES
6864 East Fifty-Seventh Street
Tulsa, Oklahoma

Attorneys for Respondent

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

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UNITED STATES OF AMERICA, ET AL. - *Petitioners*

v.

ELIZABETH JANE HALL - - - - *Respondent*

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals is recorded at p. 493 F. 2d 1211 and is reproduced at pp. 7(a)-10(a) in Appendix B of the Petition for Certiorari. *Jurisdiction* of this Court is invoked under 28 USC 1254(1).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The Anti-Injunction Act (Section 7421(a)) of the Internal Revenue Code of 1954 bars a suit in any Court by any person to restrain the assessment or collection of any tax, except where the Commissioner does

not send a deficiency notice to the taxpayer as he is required to do under Section 6212(a) and Section 6861(b). If a taxpayer's taxable year is terminated under Section 6851(a) which is entitled "Income Tax and Jeopardy" is the taxpayer entitled to a deficiency notice?

2. Does IRS violate the Fifth Amendment rights of a taxpayer when it terminates the taxpayer's taxable year, seizes the taxpayer's property, and puts it up for sale without giving the taxpayer an opportunity for a judicial determination of the vadility of the tax?

STATUTES INVOLVED

All pertinent statutes appear in Appendix A of the Petitioner's Brief.

STATEMENT OF THE CASE

On June 17, 1971, the President of the United States, Richard M. Nixon, announced the Administration would expand its efforts to combat the menace of drug abuse. The Internal Revenue Service was the agency President Nixon selected to aid in the war on drugs. Page 1 of the appendix to this Brief contains a photocopy of an actual page of the Internal Revenue Service Manual which was designed to implement the President's orders. Page 2 of the appendix to this Brief contains a sample letter that was sent to all Regional Directors of IRS to use in this implementation. The appended letter is substantially the same as the letter that was delivered on February 1, 1972, to the Respondent, Elizabeth Jane Hall. A copy of the letter

that was delivered to Mrs. Hall is found at p. 11 of the appendix to the Court (hereinafter referred to as App. Ct.). The instructions set out in the IRS Manual indicate tax collection efforts of IRS should be directed against those individuals who are suspected of trafficking in drugs and collection should be vigorous (Paragraph 2, p. 1 Appendix to this Brief). With the sending of this Manual supplement to the Regional Directors, the spring-loaded trap was set and all that was needed was a victim to step into it.

The trap set by IRS started closing around Jane Hall when her husband, Sterling Hall, was arrested in Brownsville, Texas, convicted and sentenced under the Young Adult Offenders Act for trafficking in marijuana. Following the confinement of Mr. Hall, Lieutenant Donald Powers, a Kentucky State Trooper, who apparently believed that Mrs. Hall must necessarily be involved in her husband's illegal activities, obtained a Search Warrant on January 31, 1973, and along with approximately ten State Troopers proceeded to Respondent's home, presented the Search Warrant and thoroughly searched the premises. The search produced a minuscule quantity of drugs.

These drugs were found in obscure places in Mrs. Hall's home and she has consistently stated the drugs were the property of her husband and she did not know these drugs were in her home. After the search was completed, Powers arrested Mrs. Hall and charged her with trafficking in marijuana. Respondent alleges that Powers was disappointed when his search produced only a minuscule quantity of drugs, and there-

fore he decided to take further punitive action against Mrs. Hall by proceeding to the Regional Office of IRS and advising the Director that he had discovered a drug pusher in the person of Elizabeth Jane Hall.

Acting on this information which was totally erroneous, and without further investigation, agents of the Internal Revenue Service proceeded to the home of Mrs. Hall on the following day (February 1, 1973) and handed her a letter stating that she owed IRS $52,680.25 in taxes for the period commencing January 1, 1973, and ending January 31, 1973. This incredible tax bill, according to IRS, was for the income she received from the sale of drugs during this thirty-one day period.

Mrs. Hall was astonished when the IRS agent demanded on-the-spot payment. When she advised him she did not have the money, the agent proceeded to attach her property and to tow-off her automobile. The Agent also advised her that he would return shortly to confiscate her personal property including her clothing. In paragraph 6 of the complaint filed in the United States District Court, the Respondent alleges the Internal Revenue Service threatened to take property of hers that was specifically exempt from levy under Section 6334 of the Internal Revenue Code of 1954 (App. Ct., p. 4). Interestingly enough, the Government in its answer to the Plaintiff's Complaint does not deny the IRS agent threatened to take exempt property, instead the Government claims they are "without knowledge or information sufficient to

form a belief as to the allegations of fact contained in paragraph 6 of the Complaint" (App. Ct., p. 23).

Shortly thereafter a notice was given by IRS that Mrs. Hall's car would be sold at public auction. When Mrs. Hall was notified her assets would be sold she was literally helpless. IRS had not sent her a deficiency notice which is a jurisdictional prerequisite to filing a suit in Tax Court. Her total assets were insignificant compared to the amount of the tax bill, therefore, she could not pay the assessment and file a refund suit in the District Court under the full payment rule of *Flora* v. *United States,* 362 U. S. 145 (1960). Because IRS had taken all of her assets, there was no way for her to post an adequate bond. Thus, Mrs. Hall took the only alternative available to her and filed suit in the United States District Court and asked that Internal Revenue Service be enjoined from selling her property.

Because the conduct of the IRS agents and Lieutenant Powers was so outrageous, the United States District Court not only enjoined the sale of Mrs. Hall's property, but the Court also enjoined these individuals from trespassing on her property and from harassing her or intimidating her in any manner. (A copy of the Preliminary Injunction may be found at page 5A of the government's petition for certiorari.)

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Because the conduct of the IRS agents and Lieutenant Powers was so outrageous, the United States District Court not only enjoined the sale of Mrs. Hall's property, but the Court also enjoined these individuals from trespassing on her property and from harassing her or intimidating her in any manner. (A copy of the Preliminary Injunction may be found at page 5A of the government's petition for certiorari.)

SUMMARY OF ARGUMENT

In the enforcement of the laws of the United States all other government law enforcement agencies must operate within the framework of the United States Constitution. Internal Revenue Service has been given enormous power by Congress to collect taxes that are due and owing to the United States and so long as IRS is operating under the guise that they are collecting taxes, IRS contends it has carte blanche. The Respondent disagrees.

At the same time the Government was trapping Mrs. Hall and other persons similarly situated, the Government was also trapping itself. IRS rushed head-on into the war on drugs and did not stop to formulate in advance any legal explanation for its conduct. The thinly veiled excuse that it was collecting taxes has evaporated under the barrage of suits filed throughout the Country. The Government has floundered in its attempt to justify its actions and from time to time and from Court to Court has changed its legal arguments in an attempt to legalize the actions of IRS.

In order for the Petitioner to prevail the requirements of Section 6212 which provides for the sending of a deficiency notice must be circumvented. In order to avoid the mandate of this section, IRS originally argued the authority for the Secretary to assess taxes was inherent in Section 6851 and because this section did not require the sending of a deficiency notice, IRS was permitted to assess and collect taxes without sending a notice to the taxpayer. *Schreck* v. *United States*, 301 F. Supp. 1265 (D. Md. 1969).

Apparently recognizing this argument was without merit, IRS then changed its position and argued that Section 6201 provides the Secretary an alternative method of assessing taxes and because this section contains no reference to a deficiency notice the Government can assess and collect taxes without sending the notice.

This argument was advanced in *Irving* v. *Gray*, 479 F. 2d 20 (2d Cir. 1973) and *Clark* v. *Campbell*, 501 F. 2d 108 (5th Cir. 1974), and in the case at bar.

The Respondent contends that when a deficiency exists, the Secretary must send notice to the taxpayer (Section 6212), and IRS cannot make any assessments until ninety (90) days after the notice is sent. During this ninety (90) day grace period, the taxpayer can petition Tax Court for a redetermination of the deficiency. However, the taxpayer cannot file the petition unless the deficiency notice is sent.

In the instant case, Mrs. Hall was denied the opportunity to litigate her claim in Tax Court because IRS arbitrarily decided not to send her the necessary notice. Because IRS failed to send the deficiency notice, it is the Respondent's position that the prohibitions contained in the Anti-Injunction Act are inapplicable. The Respondent also contends that when a taxable year is terminated in a jeopardy situation, the authority for IRS to assess taxes is contained in Section 6861, and the procedural safeguards of that section apply.

The Government has argued that Section 6201 provides the Secretary with the authority to assess taxes in a jeopardy situation, but the Respondent disagrees with this position and concedes that while Section 6201 does offer independent assessment authority, Section 6201 does not apply to jeopardy situations.

Finally, the Respondent will argue that if this case does not fall within any of the exceptions to the Anti-Injunction Act, the actions of IRS violate the United States Constitution.

ARGUMENT

I. WHEN IRS TERMINATES A TAXABLE YEAR IS THE AMOUNT DEMANDED BY IRS AN "IMPOSED TAX" AND IF THE TAXPAYER IS UNABLE TO PAY THE AMOUNT DEMANDED BY THE GOVERNMENT DOES THAT CREATE A DEFICIENCY WITHIN THE MEANING OF SECTION 6211?

These issues are important because if the amount demanded by the Government is not an imposed tax and no deficiency is created, then the taxpayer is not entitled to a deficiency notice.

A. What is an Imposed Tax?

1. When IRS Terminates a Taxable Year Under Section 6851 a Tax Is Imposed.

In answering these very important questions there has been a definite split of authority between the Circuit Courts. *Rambo* v. *United States,* 492 F. 2d 1060 (6 Cir. 1974), held the amount demanded by the Govern-

ment was an imposed tax and if the taxpayer could not pay the bill, a deficiency was created. The same result was reached in *Clark* v. *Campbell,* 501 F. 2d 108 (5 Cir. 1974).

However, Respondent acknowledges there is authority to support the opposite view and the strongest case in the Government's arsenal is *Irving* v. *Gray,* 479 F. 2d 20 (2 Cir. 1974), wherein the Court cited as authority the case of *Williamson* v. *United States,* 31 Am. Fed. Tax R. 2d 75-800 (7 Cir. 1971) and *Ludwig Littauer & Co.* v. *Commissioner,* 37 B.T.A. 840 (1938).

The *Littauer* case provided the genesis for the idea that when a termination occurred under Section 250(g) (the predecessor to 6851) the amount claimed by the Government was not a tax imposed but only "a provisional statement of the amount which must be presently paid as a protection against the impossibility of collection"[1] (Littauer, p. 842). Thus, the *Littauer* Court created the theory that the IRS was not imposing a tax when a taxable year was terminated under Section 6851.

In *Williamson* the Court cited *Littauer* as controlling and held at p. 73-800:

---

[1]A careful reading of this case (Littauer) reveals this statement to be merely dictum. The issue of what is an imposed tax was not before the Court. The issue considered by the Court was whether a deficiency notice is a jurisdictional prerequisite to filing a suit in Tax Court. The Court sustained the Government's motion to dismiss because no deficiency notice had been sent to the taxpayer and, therefore, the suit was premature. However, what was once dictum in *Littauer* evolved through *Williamson* v. *United States,* 31 Am. Fed. Tax R. 2d 73-800 (7 Cir. 1971) and became case law in *Irving* v. *Gray,* 479 F. 2d 20 (2 Cir. 1974).

"The assessment in this case *was not an imposed tax,* but merely an amount which the IRS believed justified the termination of the taxable year." (Emphasis Added)

The Second Circuit in deciding *Irving* v. *Gray, supra,* 479 F. 2d 20 (2 Cir. 1974), used this exact quote from *Williamson* and concluded the IRS had not imposed a tax, and further no deficiency existed within the meaning of Section 6211. The Court concluded that a taxpayer whose year was terminated under Section 6851 was not entitled to a deficiency notice because no deficiency had been determined and, therefore, the taxpayers ". . . do not yet have the opportunity to petition the Tax Court" (*Irving* p. 24). The Court then concluded the taxpayer was not without a remedy because he could file a return and wait six months and sue for a refund (*Irving* p. 24).

The Respondent with due respect to the Second Circuit submits their conclusion that no tax was imposed is illogicial and not supported by either reason or law.

In the case at bar, the Government delivered a notice to Mrs. Hall stating her taxable year had been terminated. This notice may be found in its entirety at p. 11 of the appendix. However, to emphasise the point six lines from the Exhibit are quoted below:

". . . I declare the taxable period 1-1-73 through 1-30-73 immediately terminated and the income *tax* for such period immediately due and payable.

Any such *tax* in the following amount that is unpaid will be immediately assessed against you.

TAXABLE PERIOD	TAX	PENALTY
1-1-73 thru 1-30-73	$52,680.25	

Demand for immediate payment of the full amount of this *tax* is hereby made." (Emphasis Added)

It is obvious from the language of this letter that IRS thought it was imposing a tax at the time it terminated Mrs. Hall's taxable year, and now it seems ludicrous for the petitioner to argue otherwise.

Moreover, the *Irving* Opinion is internally inconsistent. After quoting that portion of the *Williamson* case which states the amount is not an imposed tax, two paragraphs later the Court states:

". . . they could have had their complaint of an overpayment heard in the District Court below if they had filed full-year returns reporting overpayments of *tax*" (p. 24). (Emphasis added.)

In order to uphold the IRS position, the Second Circuit adopted the semantical argument of the *Williamson* case, but in the final analysis the Court acknowledged reality and admitted that IRS had taxed the individual.

2. What If No Imposed Tax Has Been Imposed?

Respondent argues that it is obvious that IRS has imposed a tax and the preceding argument dramatically supports her position, but assuming *Williamson* v. *United States, supra,* 31 Am. Fed. Tax R. 2d 73-800 (7 Cir. 1971) is correct, the results are even more interesting.

If no tax has been imposed, the Respondent respectfully asks IRS to explain how they seized her property and under what authority they proposed to sell it? The relevant portion of Section 6331 which deals specifically with levies provides:

> "If any person liable to pay any *tax* neglects or refuses to pay the same. . . . it shall be lawful for the Secretary or his delegate to collect such *tax* . . . by levy upon all property belonging to such person . . ." (Emphasis Added)

From this provision it is clear the Director cannot seize Mrs. Hall's car on a whim. The only circumstance that warrants the seizure and sale of a taxpayer's property is when there are unpaid taxes due and owing to the United States. Thus, if the Second Circuit is correct and this is not an imposed tax the Respondent respectfully submits the Government has absolutely no right to seize her property because the Code does not allow for seizures under any circumstances unless they be made in connection with the collection of taxes.

Furthermore, the entire thrust of the Government's argument is that Mrs. Hall's suit is barred by Section 7421 of the Code, which is commonly called the Anti-Injunction Act. The relevant Section 7421 provides:

> ". . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court by any person . . ."

If the *Williamson* Court was correct, and only a "provisional amount" is seized when a taxable year is terminated, the Government instantly loses its case.

The Anti-Injunction Act provides the Government shall not be restrained from the assessment or collection of any tax, but Section 7421 does not prohibit an aggrieved taxpayer from filing suit to stop the Government from collecting a "provisional amount".

From this discussion it is obvious that IRS is imposing a tax, and Respondent submits that it would be self defeating for IRS to argue otherwise.

B. What is a Deficiency?

Interwoven with the issue of what constitutes an imposed tax is the issue of what is a deficiency within the meaning of Section 6211.

Section 6212 requires IRS to send a deficiency notice if the Secretary determines that there is a deficiency in respect to any tax imposed by Subtitle A (Income Taxes) or B or Chapter 42.

Section 6213 prevents IRS from selling the taxpayer's property until after the taxpayer has had an opportunity to file a petition in Tax Court for a redetermination of the deficiency.

In the case at bar, notwithstanding the fact that no deficiency notice was sent, IRS seized and put up for sale the assets of Mrs. Hall. In order to justify the action of IRS the Petitioner must establish that no deficiency was created when Mrs. Hall's taxable year was terminated.

Going back to *Williamson* v. *United States,* 31 Am. Fed. Tax P. 2, 73-800 (7 Cir. 1971), we find that Court holding an assessment made under Section 6851 is not

a deficiency as defined in Section 6211. This conclusion was reached because the Court did not believe the amount of money demanded by IRS was an imposed tax and further because no tax return had been filed, no deficiency was determinable (*Williamson* p. 73-800). Again the rationale of this decision was adopted by the Second Circuit in the *Irving* case. However, the conclusions of these two Courts cannot hold up under scrutiny.

The relevant Section of 6211 defines a deficiency as:

> ". . . the term 'deficiency' means the amount by which the tax imposed. . . . exceeds the excess of—
>
> 1. The sum of . . .
>
> a. The sum shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon."

This Section is expanded by Treasury Regulation 301.6211-1(a) which provides in part:

> "If *no return is made* or if the return . . . does not show any tax . . . the amount shown as the tax by the taxpayer upon his return shall be considered as zero. Accordingly, in any such case if no deficiencies . . . have been assessed or collected . . . the deficiency is the amount of *tax imposed* by Subtitle A, [Income Tax Title] Chapter 11, or Chapter 12." (Emphasis and Words in Brackets Added.)

From these definitions, it is clear that where a tax is imposed and no return is made the deficiency becomes the amount of the tax, and the government is placed in the untenable position of arguing against its own regulation.

Moreover, the question of what constitutes a deficiency has been thoroughly dissected in the case of *Clark* v. *Campbell,* 501 F. 2d 108 (5 Cir. 1974). In *Clark,* the specific argument was made by IRS that no deficiency existed following a short year termination under Section 6851. The Court rejected this argument and pointed out the defects in reasoning in the *Irving* case and held at p. 117:

> "Indeed Section 6211 in a very technical sense undertakes to define 'deficiency' 'if a return was made by the taxpayer' with no mention of that obvious class of underpayers who *do not file a return.*" (Emphasis Added)

After quoting Treasury Regulations 301.6211(a) *supra,* the *Clark* Court criticized the *Littauer* Opinion by illustrating Section 6851 "clearly provides that immediate tax liability has been imposed" (P. 118).

The Fifth Circuit then cited *Schreck* v. *United States, supra,* which is the landmark decision in this area and held there was no distinction between the deficiency created in the instant case and the deficiency created by definition in Section 6211. The Court held at p. 120:

> "We see no significant distinction nor any need for one. Since the tax liability which becomes im-

mediately due and payable following a Section 6851 quick termination fits within the codal definition of deficiency, . . ."

The same conclusions were reached by the Sixth Circuit in *Rambo* v. *United States,* 492 F. 2d 1060 (6 Cir. 1974). In anlayzing this issue the Sixth Circuit held at p. 1064:

> "Clearly the IRS has imposed a tax and just as clearly the taxpayer has denied that he owes that amount of money by refusing either to pay the imposed tax or to file a return. . . . The statute itself in no way limits the definition of a deficiency to a determination made only at the end of the taxable year."

In light of these authorities, the Respondent submits that it is obvious when IRS terminates a taxable year and imposes a tax an immediate deficiency is created.

The thrust of Petitioner's argument can be summarized by saying the Government has had to invent some incredible definitions in order to gerrymander the Code around to cover the improper actions of its agents and, therefore, the Government has been forced to present illogical and contorted arguments. When the arguments of the Government are compared with the highly analytical opinions of *Rambo* and *Clark,* it is clear the Government is grasping at straws.

II. WHEN A TAXABLE YEAR IS TERMINATED UNDER SECTION 6851 THE AUTHORITY FOR THE SECRETARY TO MAKE AN ASSESSMENT ORIGINATES IN SECTION 6861 AND THEREFORE THE PROCEDURAL SAFEGUARDS OF SECTION 6861 APPLY.

From the preceding argument it is obvious a deficiency is created when a taxable year is terminated under Section 6851, and therefore the procedural safeguards of Sections 6212 and 6213 apply. However, if this Court adopts the position of IRS on the issue of deficiency, the Petitioner still must hurdle the requirements of Section 6861 before it can prevail.

A. The Assessment Authority Under 6851 Does Not Originate in Section 6201.

When Mrs. Hall's taxable year was terminated the Government did not send her a deficiency notice. Failure of the Government to send the notice seems trivial and unimportant at first blush, but upon carefully examining the situation, the absence of a deficiency notice becomes of paramount importance because the taxpayer cannot litigate his claim in Tax Court until he receives the notice. 26 USC 6213(a); *Mason* v. *Commissioner of Internal Revenue,* 210 F. 2d 388 (5 Cir. 1954); *Corbett* v. *Frank,* 293 F. 2d 501 (9 Cir. 1961).

This places the taxpayer in a tenuous position because his right to petition tax court is dependent on circumstances entirely beyond his control.

In the case at bar, IRS terminated Mrs. Hall's taxable year under the authority of Section 6851. This section is titled "Termination of Taxable Year", and is found in Chapter 70, Subchapter A which is entitled "Jeopardy". The next succeeding section of Subchapter A is Section 6861 entitled, "Jeopardy Assessments of Income, Estate, Gift Taxes". Section 6861 authorizes the assessment of taxes, but it also contains a requirement that the Secretary send a deficiency notice within sixty (60) days after making the assessment if the jeopardy assessment is made before any notice is given to the taxpayer. The receipt of this notice would enable the taxpayer to petition the Tax Court for a determination of his tax liability, and while the case was pending IRS could not dispose of any of the taxpayer's assets (Section 6213).

In order to circumvent the requirements of Section 6861, the Government has devised some unique arguments. In *Schreck* v. *United States,* 301 F. Supp. 1265 (D. Md. 1969), IRS argued the power to assess taxes was inherent in Section 6851. When this argument failed IRS changed its legal theory and argued Section 6201 provided the authority to assess taxes when a taxable year was terminated under Section 6851. This argument was advanced by IRS in the case at bar, and in the case of *Irving* v. *Gray, supra,* 479 F. 2d 20 (2 Cir. 1973); *Rambo* v. *United States, supra,* 492 F. 2d 1060 (6 Cir. 1974); and *Clark* v. *Campbell, supra,* 501 F. 2d 108 (5 Cir. 1974).

In *Irving,* the Second Circuit adopted the Government's position and held at p. 24:

> "But Section 6201(a) is an alternative authorization for IRS assessment which requires no deficiency letter."

The opposite conclusion was reached by the Fifth Circuit in *Clark,* wherein the Court held at p. 121:

> "Section 6201 defines generally the authority to *assess uncontested taxes.* Where there is no contest (e.g. payment in accordance with the return) there is no great need for a prepayment forum." (Emphasis Added).

The Government's argument was also rejected by the Sixth Circuit in *Rambo.*

Even though IRS has changed its position on the issue of the origin of assessment authority, the Government has consistently maintained the assessment authority used in connection with Section 6851 does *not* originate in Section 6861. The reason for this consistency is because Section 6861 requires IRS to send a deficiency notice to the taxpayer if the jeopardy assessment is made before any notice has been given. If IRS does not send the notice the prohibitions of the Anti-Injunction Act are waived and the taxpayer can enjoin the collection of the tax. Thus, the Government has had to search for some alternative method of assessment that does not lie in Section 6861.

In the instant case, the Government has gone into extensive detail, tracing the history of 6201 (Petitioner's Brief pp. 27-46) and therefore, it would seem necessary to attack the history of the statute in order to rebut Petitioner's argument. However, such is not the

case. A simple reading of Section 6201 is enough to prove it was not intended to be used in jeopardy situations.

On page 20 of the Petitioner's Brief in the last paragraph the following quote is found:

> "The assessment authority is set forth in Section 6201, . . . which empowers the Commissioner 'to make the * * * assessments of all taxes * * *' without regard to whether a 'deficiency' exists."

Again on page page 23, Section 6201, is quoted as follows:

> "But only Section 6201 specifically provides that '(t)he Secretary or his delegate is authorized and required to make * * * assessments of all taxes * * *'."

In both quotes the Petitioner has omitted a critical phrase and is attempting to deceive the Court. The relevant portion of 6201 with the key phrase included provides:

> "The Secretary or his delegate is authorized and required to make the . . . assessments of all taxes . . . imposed by this title . . . which have not been fully paid *by stamp* at the time and the manner provided by law" (Emphasis Added).

Only by omitting the phrase "by stamp" can IRS argue Section 6201 provides assessment authority for jeopardy situations. At no time has any contention been made that this case is a Chapter 69 case dealing with taxes that are to be *paid by stamp*.

Paragraph (1) of Section 6201 deals with taxes shown on returns or lists. In the case at bar, no return was made and no argument has been presented that this case falls within Section 6021 which deals with "lists".

Paragraph (2) of 6201 deals with unpaid taxes by stamp and Subsection (3) deals with the erroneous income tax prepayment credits.

From this discussion it is clear that Section 6201 has nothing to do with jeopardy situations, and the Petitioner is attempting to bend Section 6201 to conform to its argument.

B. The Code Directs IRS to Chapter A for Special Rules Relating to Jeopardy Assessments.

If Section 6201 does not provide assessment authority for Section 6851, then where in the Code is the Secretary authorized to assess taxes when a taxable year is terminated pursuant to 6851? This answer can easily be found by reading Section 6201(d) which states:

> "For special rules applicable to deficiencies of income . . . taxes, see Subchapter B."

In turn Subchapter B, Section 6216(2) provides:

> "For procedures relating to jeopardy assessments, see Subchapter A of Chapter 70."

In order to avoid the consequences of these explicit directions from Congress, Petitioner cites Section 7806(A)(B) which in essence states that no legal sig-

nifiance should be given to the location of the grouping of the various sections or to cross-reference tables or to any table of contents. (Petitioners Brief p. 42)

Despite the provisions of Section 7806 the unavoidable conclusion is Congress specifically directed us to a Code Section other than 6201 for the rules relating to deficiencies and jeopardy assessments.

If Congress believed Section 6201 was applicable to deficiencies, short year terminations, and jeopardy, there would have been no need to direct us to another section of the Code.

To conclude otherwise would be like opening the sports page and reading an article about the Notre Dame-Alabama football game, and then finding a statement at the end that reads: "For a run-down on the USC-Ohio State game see page 3."

When we see an editorial notation like this should we conclude the information about the USC-Ohio State game is on page 3, or should we assume somehow the information was magically contained in the article we just finished reading? The inescapable conclusion is that we had better look at page 3. Likewise, when we are reading the Code and we find an editorial notation directing us to another section for the special rules relating to deficiency and jeopardy, common sense dictates that we must look to these sections.

C. Section 6861 is Not Limited to Year End Situations.

Another argument advanced by the government is that section 6861 can be invoked only at the date on which the taxes for the full taxable year due is payable i.e. April 15 of the following year (Petitioners Brief page 22). However, this conclusion is not supported by the language of Section 6861 because nowhere in that Section does it state these powers are applicable only after the date on which taxes for the full taxable year are due.

D. The Historical Analysis Indicates Section 6861 May Have Been the Section Congress Intended for Use in Exigent Situations.

The Government argues Section 6851 was designed for more exigent situations than Section 6861 (Petitioner's Brief, p. 21). In order to support this contention, Petitioner cites the Revenue Act of 1921 and argues that the predecessor to Section 6861 [250(d)] contained a provision for an administrative appeal, but the predecessor to 6851 [205(g)] did not allow an appeal. Therefore, Petitioner concludes that Section 205(g) was to be used in more exigent circumstances than Section 205(d).

However, there is evidence that Congress had envisioned much more than an administrative appeal under Section 205(g). A portion of that Section not cited by the Petitioner states:

> "In *any action or suit* brought to enforce payment on taxes made due and payable by virtue of

> the provisions of this subsection, the findings of the Commissioner made as herein provided, whether made after notice of the taxpayer or not shall be for all purposes *presumptive evidence* of the taxpayer's design" [Revenue Act of 1921, 205(g), Petitioner's Brief, p. 72]. (Emphasis added.)

This language has been carried forward in Section 6851 of the Revenue Code of 1954, which provides:

> "In *any proceeding in Court* brought to enforce payment of taxes made due and payable by virtue of the provisions of this section the findings of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy" [Petitioner's Brief, p. 61]. (Emphasis added.)

From these provisions it is reasonable to conclude that Congress intended for IRS to immediately file suit when it appeared the taxpayer was doing something that would make the collection of taxes ineffective. The filing of this suit would of course allow the taxpayer his day in Court and would afford him the opportunity to present evidence to overcome the presumption that runs in favor of the Secretary.

If Congress had intended to authorize IRS to levy on the taxpayer's property without a hearing, why would Congress have gone to the trouble of making the Secretary's findings presumptive evidence of jeopardy? If the Secretary was going to collect the taxes

through any means other than litigation he would not need the benefit of this presumption.

By examining the predecessor to 6861 [205(d)], we find Congress empowered the Commissioner to disregard the administrative appeal procedure in certain cases where:

> ". . . the Commissioner believes that the collection of the amount due would be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing" [Revenue Act of 1921, Section 250(d)] [Petitioner's Brief, p. 71].

A similar provision for emergency situations is contained in Section 6861 of the 1954 Code. Section 6212 requires the Secretary to send a deficiency notice when he determines there is a deficiency in respect to any tax imposed by Subtitle A (Income Taxes). Section 6213 prevents the Government from making any assessments until 90 days after the notice is sent. This 90 day grace period is allowed so the taxpayer can file a petition in Tax Court for redetermination of the deficiency.

According to Section 6213, the rule against making any assessments applies to all cases "except as provided in Section 6861," which empowers the Secretary to make assessments and to collect deficiencies without giving notice to the taxpayer. However, if the Secretary acts before any notice has been given under Section 6212(a), the Secretary must mail notice to the taxpayer within sixty (60) days *after* making the assessment. In other words, Section 6861 envisions a

situation where the advance notice requirement of Section 6212 can be waived. Obviously, this affords IRS an opportunity to immediately assess taxes; conversely from the language of Section 6851 it appears that a suit must be filed in order to effect collection.

The Respondent concedes it is impossible to know beyond any doubt what Congress intended. The meaning of these Sections are buried with the men who wrote them and we must now carefully sort and study their work in order to guess what was in their minds at the time these Sections were written. In so doing, the Respondent contends that her interpretation of the Code is more logical and reasonable than the interpretation of the Government.

III. NOTWITHSTANDING THE PROVISIONS OF THE CODE, IT WAS UNCONSTITUTIONAL FOR IRS TO TAKE MRS. HALL'S ASSETS.

Even if the Government is correct in its interpretation of the Code: that Section 6851 stands alone; that Section 6201(a) can be used to assess taxes against a short year taxpayer; that Section 6331 can be used to immediately levy upon and seize property without first complying with the deficiency procedures of Section 6861, such action violates the due process clause of the Fifth Amendment.

A study of the Code offers legal scholars the opportunity to debate the esoteric meaning of a very complex Code. However, the issues in this case transcend codal arguments.

In *Rambo* v. *United States, supra,* 492 F. 2d 1060 (6 Cir. 1974), Rambo admitted he was the conduit for the passage of chemical compounds used in the manufacture of illegal drugs. He had $12,661.25 in his bank account, $2,200.00 in cash, three automobiles, and at the time of his arrest he was in possession of enough tranquilizers to fill a briefcase.

In *Laing* v. *United States, supra,* 496 F. 2d 853 (D.Vt. 1973), the taxpayer was a resident of New Zealand, and had entered the United States on a B2 Visa. When he attempted to leave the United States and to enter Canada the Candian officials refused him entry and when he returned to the United States, the Custom Officials found a suitcase containing $310,000.00 in the engine compartment of his automobile.

In *Irving* v. *Gray, supra,* 479 F. 2d 20 (2 Cir. 1973), the taxpayer was a resident of Ibiza and when his involvement in the Howard Hughes hoax was discovered the Internal Revenue knew that Irving had obtained $650,000.00 from McGraw-Hill Publishing Company and that Merrill-Lynch was holding certain funds on his behalf.

While the Respondent believes that IRS was wrong in each of the above cases, defense of these taxpayers must be left to other attorneys.

In the case at bar, Mrs. Hall was not trafficking in illegal drugs, she was not a resident of another country, she had not received any large sum of money, and she was not trying to leave the Country. Instead, she was residing quietly at her home in Shelby County, Kentucky when agents from IRS fell upon her and pre-

sented a tax bill that exceeded her total assets by more than ten times.

In order for Mrs. Hall to owe $52,680.25 in taxes, she would have had to earn more than $100,000.00 during the thirty (30) day period that was terminated. If she earned this money, what happened to it? She obviously did not spend it on houses and cars because she lived very modestly in a rented home and she had one 1970 Volkswagen. The police thoroughly searched her house then IRS attached her bank account and safety deposit box yet no one found the missing $100,000.00. The fact the money did not appear surprised no one, including IRS, because the Service was not interested in collecting taxes, instead it was interested in harassing Mrs. Hall pursuant to the Presidential Directive (p. 1, Appendix this Brief). If Mrs. Hall had been sent a deficiency notice, she would have petitioned Tax Court and the case would have been over, but IRS did not want a speedy determination of the tax issue; instead, IRS wanted to destroy Mrs. Hall through the use of its insidious power in complete disregard to concepts of due process.

After all of Mrs. Hall's assets had been sold it logically follows that if she continued to work, IRS would have summarily attached her paycheck and left her penniless. She was trapped in a web of bureaucratic zeal and it does not take much imagination to see that she would have soon been on the welfare rolls if IRS had not been stopped by the District Court Injunction.

Notwithstanding the holding of *Irving* v. *Gray*, *supra*, 479 F. 2d 20 (2 Cir. 1973), Mrs. Hall had no

recourse except to file suit and request an injunction. The Government had deliberately closed the door to Tax Court by not sending her a deficiency notice, and the other remedies suggested by the *Irving* Court were simply of no value to Mrs. Hall. In *Lisner* v. *McCauless*, 356 F. Supp. 398 (D. Ariz. 1973), the Court considered issues very similar to the issues in the case at bar and concluded at p. 402:

> "Jeopardy cases are either a part of this general scheme, or they represent yet a third category of assessment in which all the rules are waived. The government of course prefers the latter interpretation and would have the Court rely on the absolute power of the sovereign to collect taxes in such a manner. The point is that it is doubtful that Congress intended that effect on its code structure."

The *Lisner* Court further held at p. 406:

> ". . . To imagine that Congress, which enacted these two sections under the general title 'Subchapter A—Jeopardy,' intended the sections to be used as 'wild cards' without reference to its carefully constructed collection scheme, is to ignore plain english."

Following *Lisner*, the Fifth Circuit in *Clark* v. *Campbell*, *supra*, 501 F. 2d 108 (5 Cir. 1974) criticized the suggestion that the taxpayer could post a bond to stay collection proceedings and held at p. 123:

> "Despite our vantage so far removed from the real world of business we know enough of the economic facts of life to recognize that a jeopardy

taxpayer will find it difficult, if not impossible, to obtain a bond once all of his assets have been placed beyond his control."

Finally, the Fifth Circuit in *Clark* held at p. 126:

> "We fail to see how any legitimate government interest will be prejudiced by construing the law to permit the § 6851 quick termination taxpayer to seek a redetermination in the Tax Court before his assets are involuntarily applied to the liability. The opportunity for prompt review will hardly dry up the sources of revenue or stop the Government in its tracks since virtually all other taxpayers (§ 6861 jeopardy or otherwise) who desire to contest income tax liability prior to payment are currently allowed to do so."

In addition to the criticism offered by these Courts, the Sixth Circuit in *Rambo* v. *United States, supra,* 492 F. 2d 1060 (6 Cir. 1974) aptly stated:

> "A system that permits the government to seize and sell property without affording the taxpayer any opportunity for a judicial determination of the validity of the tax prior to payment could very well raise a serious question of a denial to the taxpayer of his property without due process of law" (p. 1065).

In considering the issue of seizing a citizen's property without a prior judicial hearing, this Court in *Sniadach* v. *Family Finance Corporation,* 395 U. S. 337 (1969) and *Fuentes* v. *Shevin,* 407 U. S. 67 (1972) acknowledged that if property was taken without notice and a hearing, the taking would violate the due process provisions of the Constitution. In *Fuentes* this Court held:

> "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.
>
> "[5] If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place" (pp. 81-82).

However, this Court in *Fuentes* recognized "there are extraordinary situations that justify postponing notice and opportunity for a hearing" (*Fuentes* p. 90). These situations all involve " an important governmental or general public interest," coupled with "a special need for very prompt action" (*Fuentes* p. 92). To support this proposition, this Court cited *Phillips* v. *Commissioner,* 238 U. S. 589 (1931). In *Phillips* the taxpayer contended the procedure used by IRS violated the Constitution because it did not provide for a judicial determination *before* the assessment was made. However, this Court rejected that argument and held the taxpayer had adequate legal remedies:

> ". . . the transferee may avail himself of the provisions for immediate redetermination *of the*

liability by the Board of Tax Appeals since all provisions governing this mode of review are made applicable by §280." (P. 598) (Emphasis Added)

Unlike Mrs. Hall the taxpayer in the *Phillips* case had assets in excess of the amount assessed. Furthermore, in the case at bar Mrs. Hall has only asked that she be given the same consideration that the taxpayer was given in the *Phillips* case i.e., a prompt review of her tax liabilities by the Tax Court.

Although this Court decided for the Government in the *Phillips* case it was quite obvious that Phillips had been afforded an opportunity to challenge the validity of the tax assessment.

Respondent concedes that it is vitally important for the Government to collect its taxes but Respondent respectfully submits that if the Government sets out on a deliberate course to destroy a citizen, the Internal Revenue Service has over-reached and should be stopped.

In the case at bar Mrs. Hall was denied the right to promptly litigate her claim in Tax Court, and her other remedies were illusionary. Therefore the conduct of IRS violated her due process rights under the Fifth Amendment.

CONCLUSION

IRS has the power to assess taxes against a citizen in *any* amount. The Service can literally pick a figure out of the air and demand payment. If the taxpayer cannot meet the demand, the Service can seize and sell the taxpayer's property without giving him the opportunity to be heard in Court. A citizen can be forced into indigency on the whim of a Regional Director of IRS. Irreplaceable family heirlooms can be taken and sold. No one would be safe from the potential tyranny of IRS. Surely Congress intended no such result.

Respondent finds little comfort in Petitioner's statement that this procedure is "used sparingly" (Petitioner's Brief p. 19). Once the precedent is established the scope of the IRS operation is unlimited. What happens if the next President decides that those who oppose his economic policy should be turned over to IRS?

In *Clark* v. *Campbell, supra,* 501 F. 2d 108 Chief Judge John R. Brown noted this weapon in the arsenal of IRS had "atomic potentialities" (*Clark* p. 110).

In the name of liberty, this Court should stop IRS in its tracks and for the reasons stated affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

DONALD M. HEAVRIN
914 Republic Building
Louisville, Kentucky 40202

EDWIN F. KAGIN
1106 Citizens Plaza Building
Louisville, Kentucky 40202

MICHAEL GRAVES
6864 East Fifty-Seventh Street
Tusla, Oklahoma

Attorneys for Respondent

January, 1975

ACKNOWLEDGMENT

I wish to thank my trusty Law Clerk, Jamie McLaughlin Fish, and my dependable Secretary, Crafty Kapfhammer, for their help in the writing of this Brief. They are both smarter than I am, they work harder than I do, and they do not receive any credit for their enormous work.

DONALD M. HEAVRIN

APPENDIX

Sec 8m.162

510-85
420-282, 524-91, 5(11)G-33,
5(17)G-48, 930-127

manual
supplement

US Treasury Department Internal Revenue Service

(The Part V reading of this Supplement refers to "FY Part V")

March 24, 1972

IRS Narcotics Project - Collection and Taxpayer Service Division Participation

Section 1. Purpose

.01 This Supplement provides for Collection and Taxpayer Service participation in the national Internal Revenue Service Narcotics Project, established by Manual Supplement 930-108, CR: 420-267, 510-77, 710-37 and 940-46, dated August 31, 1971, which was reissued in November 1971 with CR 5(17)G-15 added.

.02 This Supplement sets forth the procedures and reporting requirements to be observed with regard to TDA's, TDI's, Other Investigations, and Miscellaneous Investigations identified as being within the province of the IRS Narcotics Project. It also establishes a Narcotics Project Manager (Collection) in the National Office.

Section 2. Background

.01 President Nixon, on June 17, 1971, announced the Administration's expanded effort to combat the menace of drug abuse. Included in the Presidential message is this high priority project to conduct systematic tax investigations of middle and upper echelon narcotics traffickers. The objective of this project is to disrupt the distribution of narcotics by increasing the efforts of the Service in prosecuting those narcotic traffickers who have committed criminal tax violations and to drastically reduce the income flow in this illicit activity by vigorously assessing and collecting tax and penalties on income from that source which has not been reported.

.02 This project is under the general supervision of the Assistant Commissioner (Compliance). Primary responsibility for administering the project is charged to the Directors, Audit and Intelligence. All Audit and Intelligence field personnel assigned to this project are under line supervision of district Audit and Intelligence Division Chiefs, who, in matters relating to this project, will be directly controlled and supervised by the National Office. This control and supervision will be exercised through the Narcotics Project Managers (Audit) and (Intelligence) in the National Office.

.03 Target cases will be selected by a target selection committee comprised of the Director, Office of Law Enforcement, Department of the Treasury, as Chairman and one member each from the Intelligence and Audit Divisions, the Bureau of Customs and the Bureau of Narcotics and Dangerous Drugs.

.04 Special Agents and Revenue Agents assigned to this project work exclusively on this project.

Section 3. Responsibilities of National Narcotics Project Manager (Collection)

.01 The Narcotics Project Manager (Collection) is responsible for the overall Collection and Taxpayer Service Division participation in the Narcotics Project. He is the representative of the Director, Collection Division, National Office, in narcotics matters and will keep the Director fully informed as to program requirements and accomplishments at all times. The Chief, Delinquent Returns Branch, will be the Project Manager (Collection).

.02 The Narcotics Project Manager (Collection) is responsible for all liaison functions between the Collection Division and the Audit and Intelligence Divisions.

.03 The Narcotics Project Manager (Collection) duties will include (but are not limited to) the following:

Distribution:
IRM 4200, 5100, 5200, 5(11)00, 5(17)00-100, 5(17)00-200, 5(17)00-(11)00 and 9300

BEST COPY AVAILABLE

urgent urgent urgent urgent urgent urgent

Attachment to MS 450-200, CR 520-82, 5(12)0-10 and 930-121

Pattern Letter P-49 (Rev. 4-72)

(Type on Appropriate Letterhead)

NOTICE OF TERMINATION OF TAXABLE PERIOD

Pursuant to section 6851 of the Internal Revenue Code, you are notified that I have found you (insert statutory reason for termination of taxable period) thereby tending to prejudice or render ineffectual collection of income tax for the period _____. Accordingly, I have declared the taxable period of _____ terminated; and, consequently, the income tax for the terminated period has become immediately due and payable.

Demand is hereby made for the tax for the terminated period in the following amount.

Taxable Period	Tax	Penalty

Any portion of the tax for the terminated period which is unpaid shall be assessed against you, and administrative or judicial action to collect the assessment shall be taken immediately.

Under section 443 of the Internal Revenue Code you are required to file a return for your terminated taxable period. Such termination and filing does not relieve you of the responsibility for filing a return for your usual annual accounting period under section 6012 of the Code. Any amount collected as a result of termination of the period will be applied against any assessment which may be made for the terminated period and credited against the tax finally determined to be due on your annual return.

Very truly yours,

District Director

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